UNITED STATES REPORTS

VOLUME 452

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1980

JUNE 1 THROUGH JUNE 22, 1981

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

HENRY C. LIND

REPORTER OF DECISIONS

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ERRATUM

450 U. S. 352, n. 9, line 2: "offer of" should be "order or".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
ALEXANDER L. STEVAS, Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1980

LITTLE *v.* STREATER

APPEAL FROM THE APPELLATE SESSION OF THE SUPERIOR COURT OF CONNECTICUT

No. 79–6779. Argued January 13, 1981—Decided June 1, 1981

After appellee, while unmarried, gave birth to a female child, she identified appellant as the father to the Connecticut Department of Social Services, a requirement stemming from the child's receipt of public assistance. The Department then provided an attorney for appellee to bring a paternity suit against appellant in a Connecticut state court. Appellant moved the trial court to order blood grouping tests on appellee and her child pursuant to a Connecticut statute (§ 46b–168), which includes the provision that the cost of such tests shall be chargeable against the party requesting them. Asserting that he was indigent, appellant asked that the State be ordered to pay for the tests. The trial court granted the motion insofar as it sought the tests but denied the request that they be furnished at the State's expense, with the result that no tests were performed. After a trial, the court found that appellant was the child's father, entered a damages judgment against him, and ordered him to pay child support directly to the State. The Appellate Session of the Connecticut Superior Court affirmed, holding, *inter alia*, that § 46b–168 does not violate the due process rights of an indigent defendant in a paternity proceeding.

Held: In the circumstances of this case, application of § 46b–168 to deny appellant blood grouping tests because of his lack of financial resources violated the due process guarantee of the Fourteenth Amendment. Pp. 5–17.

(a) Appellant's due process claim is premised on the unique quality

of blood grouping tests as a source of exculpatory evidence, the State's prominent role in the litigation, and the character of paternity suits under Connecticut law. In evaluating that claim, the following factors must be considered: the private interests at stake; the risk that the procedures used will lead to erroneous results and the probable value, if any, of additional or substitute procedural safeguards; and the governmental interests affected. *Mathews* v. *Eldridge*, 424 U. S. 319, 335. Pp. 5–12.

(b) Assessment of these factors indicates that appellant did not receive the process he was constitutionally due. The private interests implicated are substantial. Given the usual absence of witnesses in a paternity suit, the self-interest coloring the litigants' testimony, Connecticut's onerous evidentiary rule that the reputed father's testimony alone is insufficient to overcome the mother's prima facie case, and the State's refusal to pay for blood grouping tests, the risk is not inconsiderable that an indigent defendant will be erroneously adjudged the father. Furthermore, because of its recognized capacity to definitively exclude a high percentage of falsely accused putative fathers, the availability of scientific blood test evidence clearly would be a valuable procedural safeguard in such cases. And the State's financial interest in avoiding the expenses of blood grouping tests is not significant enough to overcome the substantial private interests involved, particularly where federal funds are available to help defray such expenses and the State could advance such expenses and then tax them as costs to the parties. Thus, without aid in obtaining blood test evidence in a paternity case, an indigent defendant, who faces the State as an adversary when the child is a recipient of public assistance and who must overcome the evidentiary burden Connecticut imposes, lacks "a meaningful opportunity to be heard." Pp. 13–16.

Reversed and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

Jon C. Blue, by appointment of the Court, 449 U. S. 948, argued the cause and filed a brief for appellant.

Stephen J. McGovern, Assistant Attorney General of Connecticut, argued the cause for appellee. With him on the brief was *Carl R. Ajello*, Attorney General.*

**Bruce J. Ennis, Jr.*, filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

This appeal presents the question whether a Connecticut statute, which provides that in paternity actions the cost of blood grouping tests is to be borne by the party requesting them, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment when applied to deny such tests to indigent defendants.

I

On May 21, 1975, appellee Gloria Streater, while unmarried, gave birth to a female child, Kenyatta Chantel Streater. As a requirement stemming from her child's receipt of public assistance, appellee identified appellant Walter Little as the child's father to the Connecticut Department of Social Services. See Conn. Gen. Stat. § 46b–169 (1981). The Department then provided an attorney for appellee to bring a paternity suit against appellant in the Court of Common Pleas at New Haven to establish his liability for the child's support.[1]

At the time the paternity action was commenced, appellant was incarcerated in the Connecticut Correctional Institution at Enfield. Through his counsel, who was provided by a legal aid organization, appellant moved the trial court to order blood grouping tests on appellee and her child pursuant to Conn. Gen. Stat. § 52–184 (1977), which later became Conn. Gen. Stat. § 46b–168 (1981) and includes the provision that "[t]he costs of making such tests shall be chargeable against the party making the motion."[2] Appel-

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[1] While the case was pending, the Court of Common Pleas was merged with the Superior Court of Connecticut. See Conn. Gen. Stat. § 51–164s (1981).

[2] In its entirety, Conn. Gen. Stat. § 46b–168 (1981) states:

"In any proceeding in which a question of paternity is an issue, the court, on motion of any party, may order the mother, her child and the putative father or the husband of the mother to submit to one or more blood grouping tests, to be made by a qualified physician or other qualified per-

lant asserted that he was indigent[3] and asked that the State be ordered to pay for the tests. The trial court granted the motion insofar as it sought blood grouping tests but denied the request that they be furnished at the State's expense. App. 8.

For "financial reasons," no blood grouping tests were performed even though they had been authorized. *Id.*, at 12. The paternity action was tried to the court on September 28, 1978. Both appellee and appellant, who was still a state prisoner, testified at trial. *Id.*, at 14–19.[4] After listening to the testimony, the court found that appellant was the child's father. *Id.*, at 2, 20. Following a subsequent hearing on damages, the court entered judgment against appellant in the amount of $6,974.48, which included the "lying-in" expenses of appellee and the child, "accrued maintenance" through October 31, 1978, and the "costs of suit plus reasonable attorney's fees." *Ibid.* In addition, appellant was ordered to pay child support at the rate of $2 per month—$1 toward the arrearage amount of $6,974.48 and $1 toward a current monthly award of $163.58—directly to Connecticut's Department of Finance and Control. *Id.*, at 20–21.[5]

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son, designated by the court, to determine whether or not the putative father or the husband of the mother can be excluded as being the father of the child. The results of such tests shall be admissible in evidence only in cases where such results establish definite exclusion of the putative father or such husband as such father. The costs of making such tests shall be chargeable against the party making the motion."

[3] Appellant's financial affidavit, which was filed with the motion, showed that he had weekly income of $5, expenses of $5, and no assets. App. 7. The trial court later specifically found that, at the time of the motion, appellant "was indigent and could not afford to pay the costs for blood grouping tests." *Id.*, at 23.

[4] Although appellant admitted intimacy with appellee, he expressed doubt that he was the child's father because of appellee's alleged relationship with another man and because she had not allowed him to see the child. *Id.*, at 17–18.

[5] The minimal sum of $2 was ordered presumably because appellant was indigent and incarcerated. However, his payments to the State are sub-

The Appellate Session of the Connecticut Superior Court affirmed the trial court's judgment in a *per curiam* opinion that is not officially reported. Relying on its prior decision in *Ferro* v. *Morgan*, 35 Conn. Supp. 679, 406 A. 2d 873, cert. denied, 177 Conn. 753, 399 A. 2d 526 (1979), the Appellate Session held that Conn. Gen. Stat. § 46b–168 (1981) does not violate the due process and equal protection rights of an indigent defendant in a paternity proceeding. The Appellate Session thus found no error in the trial court's denial of appellant's motion that the cost of blood grouping tests be paid by the State. App. 25–26.

Thereafter, appellant's petition for certification was denied by the Connecticut Supreme Court, 180 Conn. 756, 414 A. 2d 199 (1980); and we noted probable jurisdiction, 449 U. S. 817 (1980).

II

The Fourteenth Amendment provides in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." Appellant argues that his right to due process was abridged by the refusal, under Conn. Gen. Stat. § 46b–168 (1981), to grant his request based on indigency for state-subsidized blood grouping tests.

Due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Joint Anti-Facist Refugee Committee* v. *McGrath*, 341 U. S. 123, 162 (1951) (concurring opinion). Rather, it is "flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). In *Boddie* v. *Connecticut*, 401 U. S. 371, 377 (1971), the Court held that "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced

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ject to future increase pursuant to Conn. Gen. Stat. § 46b–171 (1981), which provides that "[a]ny order for the payment of [child] support . . . may at any time thereafter be set aside or altered by any court issuing such order."

to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." Accord, *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). And in *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976), we explained:

> "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

These standards govern appellant's due process claim, which is premised on the unique quality of blood grouping tests as a source of exculpatory evidence, the State's prominent role in the litigation, and the character of paternity actions under Connecticut law.

A

The discovery of human blood groups by Dr. Karl Landsteiner in Vienna at the beginning of this century, and subsequent understanding of their hereditary aspects, made possible the eventual use of blood tests to scientifically evaluate allegations of paternity. P. Speiser & F. Smekal, Karl Landsteiner 89–93 (1975). Like their European counterparts, American courts gradually recognized the evidentiary value of blood grouping tests in paternity cases, and the modern status of such tests has been described by one commentator as follows:

> "As far as the accuracy, reliability, dependability—even infallibility—of the test are concerned, there is no

> longer any controversy. The result of the test is universally accepted by distinguished scientific and medical authority. There is, in fact, no living authority of repute, medical or legal, who may be cited adversely. . . . [T]here is now . . . practically universal and unanimous judicial willingness to give decisive and controlling evidentiary weight to a blood test exclusion of paternity." S. Schatkin, Disputed Paternity Proceedings § 9.13 (1975).

The application of blood tests to the issue of paternity results from certain properties of the human blood groups and types: (a) the blood group and type of any individual can be determined at birth or shortly thereafter; (b) the blood group and type of every individual remain constant throughout life; and (c) the blood groups and types are inherited in accordance with Mendel's laws. *Id.*, § 5.03. If the blood groups and types of the mother and child are known, the possible and impossible blood groups and types of the true father can be determined under the rules of inheritance. For example, a group AB child cannot have a group O parent, but can have a group A, B, or AB parent. Similarly, a child cannot be type M unless one or both parents are type M, and the factor rh′ cannot appear in the blood of a child unless present in the blood of one or both parents. *Id.*, §§ 5.03 and 6.02. Since millions of men belong to the possible groups and types, a blood grouping test cannot conclusively establish paternity. However, it can demonstrate nonpaternity, such as where the alleged father belongs to group O and the child is group AB. It is a negative rather than an affirmative test with the potential to scientifically exclude the paternity of a falsely accused putative father.

The ability of blood grouping tests to exonerate innocent putative fathers was confirmed by a 1976 report developed jointly by the American Bar Association and the American

Medical Association. Miale, Jennings, Rettberg, Sell, & Krause, Joint AMA–ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage, 10 Family L. Q. 247 (Fall 1976). The joint report recommended the use of seven blood test "systems"—ABO, Rh, MNSs, Kell, Duffy, Kidd, and HLA—when investigating questions of paternity. *Id.*, at 257–258. These systems were found to be "reasonable" in cost and to provide a 91% cumulative probability of negating paternity for erroneously accused Negro men and 93% for white men. *Id.*, at 254, 257–258.

The effectiveness of the seven systems attests the probative value of blood test evidence in paternity cases. The importance of that scientific evidence is heightened because "[t]here are seldom accurate or reliable eyewitnesses since the sexual activities usually take place in intimate and private surroundings, and the self-serving testimony of a party is of questionable reliability." Larson, Blood Test Exclusion Procedures in Paternity Litigation: The Uniform Acts and Beyond, 13 J. Fam. L. 713 (1973–1974). As JUSTICE BRENNAN wrote while a member of the Appellate Division of the New Jersey Superior Court:

> "[I]n the field of contested paternity . . . the truth is so often obscured because social pressures create a conspiracy of silence or, worse, induce deliberate falsity.
>
> "The value of blood tests as a wholesome aid in the quest for truth in the administration of justice in these matters cannot be gainsaid in this day. Their reliability as an indicator of the truth has been fully established. The substantial weight of medical and legal authority attests their accuracy, not to prove paternity, and not always to disprove it, but 'they can disprove it conclusively in a great many cases provided they are administered by specially qualified experts' . . . ." *Cortese* v. *Cortese*, 10 N. J. Super. 152, 156, 76 A. 2d 717, 719 (1950).

B

Appellant emphasizes that, unlike a common dispute between private parties, the State's involvement in this paternity proceeding was considerable and manifest, giving rise to a constitutional duty. Because appellee's child was a recipient of public assistance, Connecticut law compelled her, upon penalty of fine and imprisonment for contempt, "to disclose the name of the putative father under oath and to institute an action to establish the paternity of said child." Conn. Gen. Stat. § 46b–169 (1981). See *Maher* v. *Doe*, 432 U. S. 526 (1977); *Roe* v. *Norton*, 422 U. S. 391 (1975).[6] The State's Attorney General automatically became a party to the action, and any settlement agreement required his approval or that of the Commissioner of Human Resources or Commissioner of Income Maintenance. See Conn. Gen. Stat. §§ 46b–160 and 46b–170 (1981). The State referred this mandatory paternity suit to appellee's lawyer "for prosecution" and paid his fee as well as all costs of the litigation. App. 10, 20; Tr. of Oral Arg. 30, 34, 40.[7] In addition, the State will be the recipient of the monthly support payments to be made by appellant pursuant to the trial court's judgment. App. 21. "State action" has undeniably pervaded this case. Accordingly, appellant need not, and does not, contend that Connecticut has a constitutional obligation to

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[6] In response to an interrogatory, appellee, through her attorney, stated that her "continuing eligibility for [public] assistance required her to disclose [the] father's identity." App. 10.

Connecticut's disclosure requirement is fostered by 42 U. S. C. § 654 (4), which directs that, as to any child born out of wedlock for whom benefits under the Aid to Families with Dependent Children program are claimed, the states must undertake "to establish . . . paternity . . . unless . . . it is against the best interests of the child to do so" and "to secure support for such child from his parent." See also 45 CFR § 232.12 (1980).

[7] At oral argument, the Assistant Attorney General of Connecticut acknowledged that the cost of any witnesses for the plaintiff in a proceeding such as this also would be paid by the State. Tr. of Oral Arg. 45.

fund blood tests for an indigent's defense in ordinary civil litigation between private parties.

The nature of paternity proceedings in Connecticut also bears heavily on appellant's due process claim. Although the State characterizes such proceedings as "civil," see *Robertson* v. *Apuzzo*, 170 Conn. 367, 372–373, 365 A. 2d 824, 827–828, cert. denied, 429 U. S. 852 (1976), they have "quasi-criminal" overtones. Connecticut Gen. Stat. § 46b–171 (1981) provides that if a putative father "is found *guilty*, the court shall order him to stand charged with the support and maintenance of such child" (emphasis added); and his subsequent failure to comply with the court's support order is punishable by imprisonment under Conn. Gen. Stat. §§ 46b–171, 46b–215, and 53–304 (1981). Cf. *Walker* v. *Stokes*, 45 Ohio App. 2d 275, 278, 344 N. E. 2d 159, 161 (1975); *People* v. *Doherty*, 261 App. Div. 86, 87, 24 N. Y. S. 2d 821, 823 (1941).

Moreover, the defendant in a Connecticut paternity action faces an unusual evidentiary obstacle. Connecticut's original "bastardy" statute was enacted in 1672, see The Book of the General Laws for the People Within the Jurisdiction of Connecticut 6 (1673), and from 1702 until 1902 it stated in pertinent part: "And if such woman shall continue constant in her accusation, being put to the discovery in the time of her travail, and also examined on the trial of the cause, it shall be prima facie evidence that such accused person is the father of such child." *Mosher* v. *Bennett*, 108 Conn. 671, 672, 144 A. 297 (1929). In *Booth* v. *Hart*, 43 Conn. 480 (1876), the Connecticut Supreme Court construed this statutory language as follows:

> "[For 146 years], parties to suits with but one exception could not testify in their own behalf. But in cases of illegitimate children, . . . an exception was made of suits brought by [a mother] for the maintenance of [her] child, and she was allowed to testify who was its father

> under certain safeguards provided by the statute. And the statute went on to provide that if she should continue constant in her accusation, being examined on oath and put to the discovery in the time of her travail, the person whom she declared to be the father of her child should be adjudged to be so, unless from the evidence introduced by him the triers should be of the opinion that he was innocent of the charge. The existence of these few facts were all that was necessary to maintain the suit in the first instance, and the burden of proof then changed to the defendant, and he was required to prove himself innocent of the accusation by other evidence than his own." *Id.*, at 485.

In 1848, the Connecticut Legislature enacted a statute providing that "[n]o person shall be disqualified as a witness in any action by reason of his interest in the event of the same, as a party or otherwise." *Id.*, at 486. Since the defendant in a paternity action was no longer precluded from testifying in his own behalf, the 1848 statute removed the need for the safeguard of putting the complainant "to the discovery in the time of her travail." *Ibid.* In its modern form, Conn. Gen. Stat. § 46b–160 (1981) simply states that "if such mother or expectant mother continues constant in her accusation, it shall be evidence that the respondent is the father of such child." Nevertheless, in *Mosher* v. *Bennett*, *supra*, at 674, 144 A., at 298, the Connecticut Supreme Court held:

> "The mother still has the right to rely upon the prima facie case made out by constancy in her accusation. She is no longer required under oath to make such discovery at the time of her travail. *The prima facie case so made out places upon the reputed father the burden of showing his innocence of the charge, and under our practice he must do this by other evidence than his own.*" (Emphasis added.)

Accord, *Kelsaw* v. *Green*, 6 Conn. Cir. 516, 519–520, 276 A. 2d 909, 911–912 (1971).[8]

Under Connecticut law, therefore, the defendant in a paternity suit is placed at a distinct disadvantage in that his testimony alone is insufficient to overcome the plaintiff's prima facie case. Among the most probative additional evidence the defendant might offer are the results of blood grouping tests, but if he is indigent, the State essentially denies him that reliable scientific proof by requiring that he bear its cost. See Conn. Gen. Stat. § 46b–168 (1981). In substance, the State has created an adverse presumption regarding the defendant's testimony by elevating the weight to be accorded the mother's imputation of him. If the plaintiff has been "constant" in her accusation of paternity, the defendant carries the burden of proof and faces severe penalties if he does not meet that burden and fails to comply with the judgment entered against him. Yet not only is the State inextricably involved in paternity litigation such as this and responsible for an imbalance between the parties, it in effect forecloses what is potentially a conclusive means for an indigent defendant to surmount that disparity and exonerate himself. Such a practice is irreconcilable with the command of the Due Process Clause.

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[8] At oral argument, the State's Assistant Attorney General represented that "[c]urrently th[is] is the law of Connecticut," *id.*, at 46; and, when presented with a hypothetical situation, his response illustrated the practical operation of the evidentiary rule:

"QUESTION: [D]oes that mean . . . that [if] she takes the stand [and says], he's the father, he's the father, he's the father, he's the father. She never deviates. . . . He takes the stand and says, I am not, I am not, I am not, I am not. And the factfinder believes him and doesn't believe her, you're saying—

. . . .

"[COUNSEL'S ANSWER]: If that was the testimony, she would win." *Id.*, at 44.

C

Our holding in *Mathews* v. *Eldridge*, 424 U. S., at 335, set forth three elements to be evaluated in determining what process is constitutionally due: the private interests at stake; the risk that the procedures used will lead to erroneous results and the probable value of the suggested procedural safeguard; and the governmental interests affected. Analysis of those considerations weighs in appellant's favor.

The private interests implicated here are substantial. Apart from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for noncompliance, at issue is the creation of a parent-child relationship. This Court frequently has stressed the importance of familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection. See *Stanley* v. *Illinois*, 405 U. S. 645, 651–652 (1972). Just as the termination of such bonds demands procedural fairness, see *Lassiter* v. *Department of Social Services*, *post*, p. 18, so too does their imposition. Through the judicial process, the State properly endeavors to identify the father of a child born out of wedlock and to make him responsible for the child's maintenance. Obviously, both the child and the defendant in a paternity action have a compelling interest in the accuracy of such a determination.[9]

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[9] In its Report on the 1974 Social Services Amendments to the Social Security Act, 42 U. S. C. §§ 654, 655, et al., the Senate Finance Committee stated:

"In taking the position that a child born out of wedlock has a right to have its paternity ascertained in a fair and efficient manner, the [C]ommittee acknowledges that legislation must recognize the interest primarily at stake in the paternity action to be that of the child. . . . The Committee is convinced that . . . paternity can be ascertained with reasonable assurance, particularly through the use of scientifically conducted blood typing." S. Rep. No. 93–1356, p. 52 (1974).

See n. 6, *supra*.

Given the usual absence of witnesses, the self-interest coloring the testimony of the litigants, and the State's onerous evidentiary rule and refusal to pay for blood grouping tests, the risk is not inconsiderable that an indigent defendant in a Connecticut paternity proceeding will be erroneously adjudged the father of the child in question. See generally H. Krause, Illegitimacy: Law and Social Policy 106–108 (1971). Further, because of its recognized capacity to definitively exclude a high percentage of falsely accused putative fathers, the availability of scientific blood test evidence clearly would be a valuable procedural safeguard in such cases. See *id.*, at 123–137; Part II–A, *supra*. Connecticut has acknowledged as much in § 46b–168 of its statutes by providing for the ordering of blood tests and the admissibility of negative findings. See n. 2, *supra*. Unlike other evidence that may be susceptible to varying interpretation or disparagement, blood test results, if obtained under proper conditions by qualified experts, are difficult to refute. Thus, access to blood grouping tests for indigent defendants such as appellant would help to insure the correctness of paternity decisions in Connecticut.

The State admittedly has a legitimate interest in the welfare of a child born out of wedlock who is receiving public assistance, as well as in securing support for the child from those legally responsible. In addition, it shares the interest of the child and the defendant in an accurate and just determination of paternity. See Regulations of Connecticut State Agencies § 17–82e–4 (1979). Nevertheless, the State also has financial concerns; it wishes to have the paternity actions in which it is involved proceed as economically as possible and, hence, seeks to avoid the expense of blood grouping tests.[10] Pursuant to 42 U. S. C. § 655 (a)(1) (1976 ed. and

[10] Laboratories surveyed in a 1977 study sponsored by the Department of Health, Education, and Welfare (now in part the Department of Health and Human Services) charged an average of approximately $245 for a

Supp. III), however, the states are entitled to reimbursement of 75% of the funds they expend on operation of their approved child support plans, and regulations promulgated under authority of 42 U. S. C. § 1302 make clear that such federal financial participation is available for the development of evidence regarding paternity, "including the use of . . . blood tests." 45 CFR § 304.20 (b)(2)(i)(B) (1980). Moreover, following the example of other states, the expense of blood grouping tests for an indigent defendant in a Connecticut paternity suit could be advanced by the State and then taxed as costs to the parties. See Ark. Stat. Ann. § 34.705.1 (1962); Kan. Stat. Ann. § 23–132 (1974); La. Rev. Stat. § 9:397.1 (West Supp. 1981); N. H. Rev. Stat. Ann. § 522:3 (1974); Ore. Rev. Stat. § 109.256 (1) (1979); 42 Pa. Cons. Stat. Ann. § 6135 (Purdon Supp. 1981); Tex. Fam. Code Ann. § 13.03 (b) (Vernon Supp. 1980–1981).[11] We must con-

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battery of test systems that led to a minimum exclusion rate of 80%. HEW Office of Child Support Enforcement, Blood Testing to Establish Paternity 35–37 (1977 Condensed Report). According to appellant, blood grouping tests were available at the Hartford Hospital for $250 at the time this paternity action was pending trial, but the cost has since been increased to $460. Brief for Appellant 4, and n. 5.

[11] Other jurisdictions also have statutes by which blood grouping tests can be made available to indigents. See, *e. g.*, Ala. Code § 26–12–5 (1977); D. C. Code § 16–2343 (Supp. V 1978); Haw. Rev. Stat. § 584–16 (1976); Md. Ann. Code § 16–66G (Supp. 1980); Mich. Comp. Laws § 722.716 (c) (1970); Minn. Stat. § 257.69 (2) (1980); N. D. Cent. Code § 14–17–15 (Supp. 1977); Utah Code Ann. § 78–25–23 (1977); Wis. Stat. Ann. § 767.48 (5) (West Supp. 1980). In addition, the highest courts of Colorado, Massachusetts, and West Virginia have held that putative fathers may not constitutionally be denied access to blood grouping tests on the basis of indigency. See *Franklin* v. *District Court*, 194 Colo. 189, 571 P. 2d 1072 (1977); *Commonwealth* v. *Possehl*, 355 Mass. 575, 246 N. E. 2d 667 (1969); *State ex rel. Graves* v. *Daugherty*, 266 S. E. 2d 142 (W. Va. 1980).

Apart from Connecticut, it also appears that North Carolina requires all defendants requesting blood tests in paternity proceedings, irrespective of means, "to initially be responsible for any of the expenses thereof" or do without them. N. C. Gen. Stat. § 8–50.1 (b)(2) (Supp. 1979).

clude that the State's monetary interest "is hardly significant enough to overcome private interests as important as those here." *Lassiter* v. *Department of Social Services, post,* at 28.

Assessment of the *Mathews* v. *Eldridge* factors indicates that appellant did not receive the process he was constitutionally due. Without aid in obtaining blood test evidence in a paternity case, an indigent defendant, who faces the State as an adversary when the child is a recipient of public assistance and who must overcome the evidentiary burden Connecticut imposes, lacks "a meaningful opportunity to be heard." *Boddie* v. *Connecticut,* 401 U. S., at 377.[12] Therefore, "the requirement of 'fundamental fairness' " expressed by the Due Process Clause was not satisfied here. *Lassiter* v. *Department of Social Services, post,* at 24.

III

"[A] statute . . . may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." *Boddie* v. *Connecticut,* 401 U. S., at 379. Thus, "a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard." *Id.,* at 380. We hold that, in these specific circum-

[12] In *Boddie,* we held that due process prohibits a state from denying an indigent access to its divorce courts because of inability to pay filing fees and costs. However, in *United States* v. *Kras,* 409 U. S. 434 (1973), and *Ortwein* v. *Schwab* 410 U. S. 656 (1973), the Court concluded that due process does not require waiver of filing fees for an indigent seeking a discharge in bankruptcy or appellate review of an agency determination resulting in reduced welfare benefits. Our decisions in *Kras* and *Ortwein* emphasized the availability of other relief and the less "fundamental" character of the private interests at stake than those implicated in *Boddie.* Because appellant has no choice of an alternative forum and his interests, as well as those of the child, are constitutionally significant, this case is comparable to *Boddie* rather than to *Kras* and *Ortwein.*

stances, the application of Conn. Gen. Stat. § 46b–168 (1981) to deny appellant blood grouping tests because of his lack of financial resources violated the due process guarantee of the Fourteenth Amendment.[13] Accordingly, the judgment of the Appellate Session of the Connecticut Superior Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

[13] Because of our disposition of appellant's due process claim, we need not consider whether the statute, as applied, also violated the Equal Protection Clause.

LASSITER *v.* DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY, NORTH CAROLINA

CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

No. 79-6423. Argued February 23, 1981—Decided June 1, 1981

In 1975, a North Carolina state court adjudicated petitioner's infant son to be a neglected child and transferred him to the custody of respondent Durham County Department of Social Services. A year later, petitioner was convicted of second-degree murder, and she began a sentence of 25 to 40 years of imprisonment. In 1978, respondent petitioned the court to terminate petitioner's parental rights. Petitioner was brought from prison to the hearing on the petition, and the court, after determining, *sua sponte*, that she had been given ample opportunity to obtain counsel and that her failure to do so was without just cause, did not postpone the proceedings. Petitioner did not aver that she was indigent, and the court did not appoint counsel for her. At the hearing, petitioner cross-examined a social worker from respondent, and both petitioner and her mother testified under the court's questioning. The court thereafter terminated petitioner's parental status, finding that she had not contacted respondent about her child since December 1975, and that she had "wilfully failed to maintain concern or responsibility for the welfare of the minor." The North Carolina Court of Appeals rejected petitioner's sole contention on appeal that because she was indigent, the Due Process Clause of the Fourteenth Amendment required the State to provide counsel for her. The North Carolina Supreme Court summarily denied discretionary review.

Held:

1. The Constitution does not require the appointment of counsel for indigent parents in every parental status termination proceeding. The decision whether due process calls for the appointment of counsel is to be answered in the first instance by the trial court, subject to appellate review. Pp. 24-32.

(a) With regard to what the "fundamental fairness" requirement of the Due Process Clause means concerning the right to appointed counsel, there is a presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. The other elements of the due process decision—the private interest at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions, *Mathews* v.

Eldridge, 424 U. S. 319, 335—must be balanced against each other and then weighed against the presumption. Pp. 25–27.

(b) The parent's interest in the accuracy and justice of the decision to terminate parental status is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest in avoiding the expense of appointed counsel and the cost of the lengthened proceedings his presence may cause, and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high. Thus if, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, the *Eldridge* factors would overcome the presumption against the right to appointed counsel, and due process would require appointment of counsel. Pp. 27–32.

2. In the circumstances of this case, the trial judge did not deny petitioner due process of law when he did not appoint counsel for her. The record shows, *inter alia*, that the petition to terminate petitioner's parental rights contained no allegations of neglect or abuse upon which criminal charges could be based; no expert witnesses testified; the case presented no specially troublesome points of law; the presence of counsel could not have made a determinative difference for petitioner; she had expressly declined to appear at the 1975 child custody hearing; and the trial court found that her failure to make an effort to contest the termination proceeding was without cause. Pp. 32–33.

43 N. C. App. 525, 259 S. E. 2d 336, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 34. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 35. STEVENS, J., filed a dissenting opinion, *post*, p. 59.

Leowen Evans argued the cause *pro hac vice* for petitioner. With him on the briefs were *Gregory C. Malhoit* and *Robert L. Walker*.

Thomas Russell Odom argued the cause for respondent. With him on the brief was *Lester W. Owen*.

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Steven Mansfield Shaber, Assistant Attorney General, argued the cause for the State of North Carolina as *amicus curiae* urging affirmance. With him on the brief for the State of North Carolina et al. as *amici curiae* were *Rufus L. Edmisten*, Attorney General of North Carolina; *Richard S. Gebelein*, Attorney General of Delaware, and *Regina Mullen Small*, State Solicitor; *Bill Allain*, Attorney General of Mississippi, and *Jim R. Bruce*, Special Assistant Attorney General; *Jim Smith*, Attorney General of Florida, and *Sidney H. McKenzie*, Assistant Attorney General; *Richard R. Bryan*, Attorney General of Nevada, and *Claudia K. Cormier*, Deputy Attorney General; and *Steve Clark*, Attorney General of Arkansas, and *Robert R. Ross*, Deputy Attorney General.*

JUSTICE STEWART delivered the opinion of the Court.

I

In the late spring of 1975, after hearing evidence that the petitioner, Abby Gail Lassiter, had not provided her infant son William with proper medical care, the District Court of Durham County, N. C., adjudicated him a neglected child and transferred him to the custody of the Durham County Department of Social Services, the respondent here. A year later, Ms. Lassiter was charged with first-degree murder, was convicted of second-degree murder, and began a sentence of 25 to 40 years of imprisonment.[1] In 1978 the Department

*Briefs of *amici curiae* urging reversal were filed by *Louise Gruner Gans*, *Catherine P. Mitchell*, and *Phyllis Gelman* for the National Center on Women and Family Law, Inc., et al.; by *David R. Lundberg* for the National Legal Aid and Defender Association; and by *Robert S. Payne* for the North Carolina Civil Liberties Union.

Wm. Reece Smith, Jr., filed a brief for the American Bar Association as *amicus curiae*.

[1] The North Carolina Court of Appeals, in reviewing the petitioner's conviction, indicated that the murder occurred during an altercation between Ms. Lassiter, her mother, and the deceased:

"Defendant's mother told [the deceased] to 'come on.' They began to struggle and deceased fell or was knocked to the floor. Defendant's

petitioned the court to terminate Ms. Lassiter's parental rights because, the Department alleged, she "has not had any contact with the child since December of 1975" and "has willfully left the child in foster care for more than two consecutive years without showing that substantial progress has been made in correcting the conditions which led to the removal of the child, or without showing a positive response to the diligent efforts of the Department of Social Services to strengthen her relationship to the child, or to make and follow through with constructive planning for the future of the child."

Ms. Lassiter was served with the petition and with notice that a hearing on it would be held. Although her mother had retained counsel for her in connection with an effort to invalidate the murder conviction, Ms. Lassiter never mentioned the forthcoming hearing to him (or, for that matter, to any other person except, she said, to "someone" in the prison). At the behest of the Department of Social Services' attorney, she was brought from prison to the hearing, which was held August 31, 1978. The hearing opened, apparently at the judge's instance, with a discussion of whether Ms. Lassiter should have more time in which to find legal assistance.

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mother was beating deceased with a broom. While deceased was still on the floor and being beaten with the broom, defendant entered the apartment. She went into the kitchen and got a butcher knife. She took the knife and began stabbing the deceased who was still prostrate. The body of deceased had seven stab wounds . . . ." *State* v. *Lassiter*, No. 7614SC1054 (June 1, 1977).

After her conviction was affirmed on appeal, Ms. Lassiter sought to attack it collaterally. Among her arguments was that the assistance of her trial counsel had been ineffective because he had failed to "seek to elicit or introduce before the jury the statement made by [Ms. Lassiter's mother,] 'And I did it, I hope she dies.'" Ms. Lassiter's mother had, like Ms. Lassiter, been indicted on a first-degree murder charge; however, the trial court granted the elder Ms. Lassiter's motion for a nonsuit. The North Carolina General Court of Justice, Superior Court Division, denied Ms. Lassiter's motion for collateral relief. File No. 76–CR–3102 (Mar. 20, 1979).

Since the court concluded that she "has had ample opportunity to seek and obtain counsel prior to the hearing of this matter, and [that] her failure to do so is without just cause," the court did not postpone the proceedings. Ms. Lassiter did not aver that she was indigent, and the court did not appoint counsel for her.

A social worker from the respondent Department was the first witness. She testified that in 1975 the Department "received a complaint from Duke Pediatrics that William had not been followed in the pediatric clinic for medical problems and that they were having difficulty in locating Ms. Lassiter . . . ." She said that in May 1975 a social worker had taken William to the hospital, where doctors asked that he stay "because of breathing difficulties [and] malnutrition and [because] there was a great deal of scarring that indicated that he had a severe infection that had gone untreated." The witness further testified that, except for one "prearranged" visit and a chance meeting on the street, Ms. Lassiter had not seen William after he had come into the State's custody, and that neither Ms. Lassiter nor her mother had "made any contact with the Department of Social Services regarding that child." When asked whether William should be placed in his grandmother's custody, the social worker said he should not, since the grandmother "has indicated to me on a number of occasions that she was not able to take responsibility for the child" and since "I have checked with people in the community and from Ms. Lassiter's church who also feel that this additional responsibility would be more than she can handle." The social worker added that William "has not seen his grandmother since the chance meeting in July of '76 and that was the only time."

After the direct examination of the social worker, the judge said:

> "I notice we made extensive findings in June of '75 that you were served with papers and called the social

services and told them you weren't coming; and the serious lack of medical treatment. And, as I have said in my findings of the 16th day of June '75, the Court finds that the grandmother, Ms. Lucille Lassiter, mother of Abby Gail Lassiter, filed a complaint on the 8th day of May, 1975, alleging that the daughter often left the children, Candina, Felicia and William L. with her for days without providing money or food while she was gone."

Ms. Lassiter conducted a cross-examination of the social worker, who firmly reiterated her earlier testimony. The judge explained several times, with varying degrees of clarity, that Ms. Lassiter should only ask questions at this stage; many of her questions were disallowed because they were not really questions, but arguments.

Ms. Lassiter herself then testified, under the judge's questioning, that she had properly cared for William. Under cross-examination, she said that she had seen William more than five or six times after he had been taken from her custody and that, if William could not be with her, she wanted him to be with her mother since, "He knows us. Children know they family. . . . They know they people, they know they family and that child knows us anywhere. . . . I got four more other children. Three girls and a boy and they know they little brother when they see him."

Ms. Lassiter's mother was then called as a witness. She denied, under the questioning of the judge, that she had filed the complaint against Ms. Lassiter, and on cross-examination she denied both having failed to visit William when he was in the State's custody and having said that she could not care for him.

The court found that Ms. Lassiter "has not contacted the Department of Social Services about her child since December, 1975, has not expressed any concern for his care and welfare, and has made no efforts to plan for his future." Be-

cause Ms. Lassiter thus had "wilfully failed to maintain concern or responsibility for the welfare of the minor," and because it was "in the best interests of the minor," the court terminated Ms. Lassiter's status as William's parent.[2]

On appeal, Ms. Lassiter argued only that, because she was indigent, the Due Process Clause of the Fourteenth Amendment entitled her to the assistance of counsel, and that the trial court had therefore erred in not requiring the State to provide counsel for her. The North Carolina Court of Appeals decided that "[w]hile this State action does invade a protected area of individual privacy, the invasion is not so serious or unreasonable as to compel us to hold that appointment of counsel for indigent parents is constitutionally mandated." *In re Lassiter*, 43 N. C. App. 525, 527, 259 S. E. 2d 336, 337. The Supreme Court of North Carolina summarily denied Ms. Lassiter's application for discretionary review, 299 N. C. 120, 262 S. E. 2d 6, and we granted certiorari to consider the petitioner's claim under the Due Process Clause of the Fourteenth Amendment, 449 U. S. 819.

II

For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which

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[2] The petition had also asked that the parental rights of the putative father, William Boykin, be terminated. Boykin was not married to Ms. Lassiter, he had never contributed to William's financial support, and indeed he denied that he was William's father. The court granted the petition to terminate his alleged parental status.

must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

A

The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation. Thus, when the Court overruled the principle of *Betts* v. *Brady*, 316 U. S. 455, that counsel in criminal trials need be appointed only where the circumstances in a given case demand it, the Court did so in the case of a man sentenced to prison for five years. *Gideon* v. *Wainwright*, 372 U. S. 335. And thus *Argersinger* v. *Hamlin*, 407 U. S. 25, established that counsel must be provided before any indigent may be sentenced to prison, even where the crime is petty and the prison term brief.

That it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel is demonstrated by the Court's announcement in *In re Gault*, 387 U. S. 1, that "the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency *which may result in commitment to an institution in which the juvenile's freedom is curtailed*," the juvenile has a right to appointed counsel even though those proceedings may be styled "civil" and not "criminal." *Id.*, at 41 (emphasis added). Similarly, four of the five Justices who reached the merits in *Vitek* v. *Jones*, 445 U. S. 480, concluded that an indigent prisoner is entitled to appointed counsel before being involuntarily transferred for treatment to a state mental hospital. The fifth Justice differed from the other four only in declining to exclude the "possibility that the required assist-

ance may be rendered by competent laymen in some cases." *Id.*, at 500 (separate opinion of POWELL, J.).

Significantly, as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel. In *Gagnon* v. *Scarpelli*, 411 U. S. 778, the Court gauged the due process rights of a previously sentenced probationer at a probation-revocation hearing. In *Morrissey* v. *Brewer*, 408 U. S. 471, 480, which involved an analogous hearing to revoke parole, the Court had said: "Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." Relying on that discussion, the Court in *Scarpelli* declined to hold that indigent probationers have, *per se*, a right to counsel at revocation hearings, and instead left the decision whether counsel should be appointed to be made on a case-by-case basis.

Finally, the Court has refused to extend the right to appointed counsel to include prosecutions which, though criminal, do not result in the defendant's loss of personal liberty. The Court in *Scott* v. *Illinois*, 440 U. S. 367, for instance, interpreted the "central premise of *Argersinger*" to be "that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment," and the Court endorsed that premise as "eminently sound and warrant[ing] adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." *Id.*, at 373. The Court thus held "that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *Id.*, at 373–374.

In sum, the Court's precedents speak with one voice about what "fundamental fairness" has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a

right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.

B

The case of *Mathews* v. *Eldridge*, 424 U. S. 319, 335, propounds three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. We must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.

This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to "the companionship, care, custody, and management of his or her children" is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley* v. *Illinois*, 405 U. S. 645, 651. Here the State has sought not simply to infringe upon that interest, but to end it. If the State prevails, it will have worked a unique kind of deprivation. Cf. *May* v. *Anderson*, 345 U. S. 528, 533; *Armstrong* v. *Manzo*, 380 U. S. 545. A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one.[3]

Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision. For this reason, the State may share the indigent parent's interest in the availability of appointed coun-

[3] Some parents will have an additional interest to protect. Petitions to terminate parental rights are not uncommonly based on alleged criminal activity. Parents so accused may need legal counsel to guide them in understanding the problems such petitions may create.

sel. If, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal. North Carolina itself acknowledges as much by providing that where a parent files a written answer to a termination petition, the State must supply a lawyer to represent the child. N. C. Gen. Stat. § 7A–289.29 (Supp. 1979).

The State's interests, however, clearly diverge from the parent's insofar as the State wishes the termination decision to be made as economically as possible and thus wants to avoid both the expense of appointed counsel and the cost of the lengthened proceedings his presence may cause. But though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here, particularly in light of the concession in the respondent's brief that the "potential costs of appointed counsel in termination proceedings . . . is [*sic*] admittedly *de minimis* compared to the costs in all criminal actions."

Finally, consideration must be given to the risk that a parent will be erroneously deprived of his or her child because the parent is not represented by counsel. North Carolina law now seeks to assure accurate decisions by establishing the following procedures: A petition to terminate parental rights may be filed only by a parent seeking the termination of the other parent's rights, by a county department of social services or licensed child-placing agency with custody of the child, or by a person with whom the child has lived continuously for the two years preceding the petition. § 7A–289.24. A petition must describe facts sufficient to warrant a finding that one of the grounds for termination exists, § 7A–289.25 (6), and the parent must be notified of the petition and given 30 days in which to file a written answer to it,

§ 7A–289.27. If that answer denies a material allegation, the court must, as has been noted, appoint a lawyer as the child's guardian *ad litem* and must conduct a special hearing to resolve the issues raised by the petition and the answer. § 7A–289.29. If the parent files no answer, "the court shall issue an order terminating all parental and custodial rights . . . ; provided the court shall order a hearing on the petition and may examine the petitioner or others on the facts alleged in the petition." § 7A–289.28. Findings of fact are made by a court sitting without a jury and must "be based on clear, cogent, and convincing evidence." § 7A–289.30. Any party may appeal who gives notice of appeal within 10 days after the hearing. § 7A–289.34.[4]

The respondent argues that the subject of a termination hearing—the parent's relationship with her child—far from being abstruse, technical, or unfamiliar, is one as to which the parent must be uniquely well informed and to which the parent must have given prolonged thought. The respondent also contends that a termination hearing is not likely to produce difficult points of evidentiary law, or even of substantive law, since the evidentiary problems peculiar to criminal trials are not present and since the standards for termination are not complicated. In fact, the respondent reports, the North Carolina Departments of Social Services are themselves sometimes represented at termination hearings by social workers instead of by lawyers.[5]

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[4] The respondent also points out that parental termination hearings commonly occur only after a custody proceeding in which the child has judicially been found to be abused, neglected, or dependent, and that an indigent parent has a right to be represented by appointed counsel at the custody hearing. § 7A–587.

Ms. Lassiter's hearing occurred before some of these provisions were enacted. She did not, for instance, have the benefit of the "clear, cogent, and convincing" evidentiary standard, nor did she have counsel at the hearing in which William was taken from her custody.

[5] Both the respondent and the Columbia Journal of Law and Social Problems, 4 Colum. J. L. & Soc. Prob. 230 (1968), have conducted surveys

Yet the ultimate issues with which a termination hearing deals are not always simple, however commonplace they may be. Expert medical and psychiatric testimony, which few parents are equipped to understand and fewer still to confute, is sometimes presented. The parents are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation. That these factors may combine to overwhelm an uncounseled parent is evident from the findings some courts have made. See, *e. g.*, *Davis* v. *Page*, 442 F. Supp. 258, 261 (SD Fla. 1977); *State* v. *Jamison*, 251 Ore. 114, 117–118, 444 P. 2d 15, 17 (1968). Thus, courts have generally held that the State must appoint counsel for indigent parents at termination proceedings. *State ex rel. Heller* v. *Miller*, 61 Ohio St. 2d 6, 399 N. E. 2d 66 (1980); *Department of Public Welfare* v. *J. K. B.*, 379 Mass. 1, 393 N. E. 2d 406 (1979); *In re Chad S.*, 580 P. 2d 983 (Okla. 1978); *In re Myricks*, 85 Wash. 2d 252, 533 P. 2d 841 (1975); *Crist* v. *Division of Youth and Family Services*, 128 N. J. Super. 102, 320 A. 2d 203 (1974); *Danforth* v. *Maine Dept. of Health and Welfare*, 303 A. 2d 794 (Me. 1973); *In re Friesz*, 190 Neb. 347, 208 N. W. 2d 259 (1973).[6] The respondent is able to point to no presently authoritative case, except for the North Caro-

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purporting to reveal whether the presence of counsel reduces the number of erroneous determinations in parental termination proceedings. Unfortunately, neither survey goes beyond presenting statistics which, standing alone, are unilluminating. The Journal note does, however, report that it questioned the New York Family Court judges who preside over parental termination hearings and found that 72.2% of them agreed that when a parent is unrepresented, it becomes more difficult to conduct a fair hearing (11.1% of the judges disagreed); 66.7% thought it became difficult to develop the facts (22.2% disagreed).

[6] A number of courts have held that indigent parents have a right to appointed counsel in child dependency or neglect hearings as well. *E. g.*, *Davis* v. *Page*, 640 F. 2d 599 (CA5 1981) (en banc); *Cleaver* v. *Wilcox*, 499 F. 2d 940 (CA9 1974) (right to be decided case by case); *Smith* v. *Edmiston*, 431 F. Supp. 941 (WD Tenn. 1977).

lina judgment now before us, holding that an indigent parent has no due process right to appointed counsel in termination proceedings.

C

The dispositive question, which must now be addressed, is whether the three *Eldridge* factors, when weighed against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty, suffice to rebut that presumption and thus to lead to the conclusion that the Due Process Clause requires the appointment of counsel when a State seeks to terminate an indigent's parental status. To summarize the above discussion of the *Eldridge* factors: the parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest, and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high.

If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel. But since the *Eldridge* factors will not always be so distributed, and since "due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed," *Gagnon* v. *Scarpelli*, 411 U. S., at 788, neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore adopt the standard found appropriate in *Gagnon* v. *Scar-*

pelli, and leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review. See, *e. g.*, *Wood* v. *Georgia*, 450 U. S. 261.

III

Here, as in *Scarpelli*, "[i]t is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements," since here, as in that case, "[t]he facts and circumstances . . . are susceptible of almost infinite variation . . . ." 411 U. S., at 790. Nevertheless, because child-custody litigation must be concluded as rapidly as is consistent with fairness,[7] we decide today whether the trial judge denied Ms. Lassiter due process of law when he did not appoint counsel for her.

The respondent represents that the petition to terminate Ms. Lassiter's parental rights contained no allegations of neglect or abuse upon which criminal charges could be based, and hence Ms. Lassiter could not well have argued that she required counsel for that reason. The Department of Social Services was represented at the hearing by counsel, but no expert witnesses testified, and the case presented no specially troublesome points of law, either procedural or substantive. While hearsay evidence was no doubt admitted, and while Ms. Lassiter no doubt left incomplete her defense that the Department had not adequately assisted her in rekindling her interest in her son, the weight of the evidence that she had few sparks of such an interest was sufficiently great that the

[7] According to the respondent's brief, William Lassiter is now living "in a pre-adoptive home with foster parents committed to formal adoption to become his legal parents." He cannot be legally adopted, nor can his status otherwise be finally clarified, until this litigation ends.

presence of counsel for Ms. Lassiter could not have made a determinative difference. True, a lawyer might have done more with the argument that William should live with Ms. Lassiter's mother—but that argument was quite explicity made by both Lassiters, and the evidence that the elder Ms. Lassiter had said she could not handle another child, that the social worker's investigation had led to a similar conclusion, and that the grandmother had displayed scant interest in the child once he had been removed from her daughter's custody was, though controverted, sufficiently substantial that the absence of counsel's guidance on this point did not render the proceedings fundamentally unfair.[8] Finally, a court deciding whether due process requires the appointment of counsel need not ignore a parent's plain demonstration that she is not interested in attending a hearing. Here, the trial court had previously found that Ms. Lassiter had expressly declined to appear at the 1975 child custody hearing, Ms. Lassiter had not even bothered to speak to her retained lawyer after being notified of the termination hearing, and the court specifically found that Ms. Lassiter's failure to make an effort to contest the termination proceeding was without cause. In view of all these circumstances, we hold that the trial court did not err in failing to appoint counsel for Ms. Lassiter.

IV

In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution. Informed opinion has clearly come to hold that an indigent parent is

[8] Ms. Lassiter's argument here that her mother should have been given custody of William is hardly consistent with her argument in the collateral attack on her murder conviction that she was innocent because her mother was guilty. See n. 1, *supra*.

entitled to the assistance of appointed counsel not only in parental termination proceedings, but in dependency and neglect proceedings as well. IJA–ABA Standards for Juvenile Justice, Counsel for Private Parties 2.3 (b) (1980); Uniform Juvenile Court Act § 26 (a), 9A U. L. A. 35 (1979); National Council on Crime and Delinquency, Model Rules for Juvenile Courts, Rule 39 (1969); U. S. Dept. of HEW, Children's Bureau, Legislative Guide for Drafting Family and Juvenile Court Acts § 25 (b) (1969); U. S. Dept. of HEW, Children's Bureau, Legislative Guides for the Termination of Parental Rights and Responsibilities and the Adoption of Children, Pt. II, § 8 (1961); National Council on Crime and Delinquency, Standard Juvenile Court Act § 19 (1959). Most significantly, 33 States and the District of Columbia provide statutorily for the appointment of counsel in termination cases. The Court's opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.

For the reasons stated in this opinion, the judgment is affirmed.

It is so ordered.

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion and add only a few words to emphasize a factor I believe is misconceived by the dissenters. The purpose of the termination proceeding at issue here was not "punitive." *Post*, at 48. On the contrary, its purpose was *protective* of the child's best interests. Given the record in this case, which involves the parental rights of a mother under lengthy sentence for murder who showed little interest in her son, the writ might well have been a "candidate" for dismissal as improvidently granted. See *ante*, at 32–33. However, I am content to join the narrow holding of the Court, leaving the appointment of counsel in termination

proceedings to be determined by the state courts on a case-by-case basis.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The Court today denies an indigent mother the representation of counsel in a judicial proceeding initiated by the State of North Carolina to terminate her parental rights with respect to her youngest child. The Court most appropriately recognizes that the mother's interest is a "commanding one," *ante*, at 27, and it finds no countervailing state interest of even remotely comparable significance, see *ante*, at 27–28, 31. Nonetheless, the Court avoids what seems to me the obvious conclusion that due process requires the presence of counsel for a parent threatened with judicial termination of parental rights, and, instead, revives an ad hoc approach thoroughly discredited nearly 20 years ago in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). Because I believe that the unique importance of a parent's interest in the care and custody of his or her child cannot constitutionally be extinguished through formal judicial proceedings without the benefit of counsel, I dissent.

I

This Court is not unfamiliar with the problem of determining under what circumstances legal representation is mandated by the Constitution. In *Betts* v. *Brady*, 316 U. S. 455 (1942), it reviewed at length both the tradition behind the Sixth Amendment right to counsel in criminal trials and the historical practices of the States in that area. The decision in *Betts*—that the Sixth Amendment right to counsel did not apply to the States and that the due process guarantee of the Fourteenth Amendment permitted a flexible, case-by-case determination of the defendant's need for counsel in state criminal trials—was overruled in *Gideon* v. *Wainwright*, 372 U. S., at 345. The Court in *Gideon* rejected the *Betts*

reasoning to the effect that counsel for indigent criminal defendants was " 'not a fundamental right, essential to a fair trial.' " 372 U. S., at 340 (quoting *Betts* v. *Brady*, 316 U. S., at 471). Finding the right well founded in its precedents, the Court further concluded that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." 372 U. S., at 344. Similarly, in *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), assistance of counsel was found to be a requisite under the Sixth Amendment, as incorporated into the Fourteenth, even for a misdemeanor offense punishable by imprisonment for less than six months.[1]

Outside the criminal context, however, the Court has relied on the flexible nature of the due process guarantee whenever it has decided that counsel is not constitutionally required. The special purposes of probation revocation determinations, and the informal nature of those administrative proceedings, including the absence of counsel for the State, led the Court to conclude that due process does not require counsel for probationers. *Gagnon* v. *Scarpelli*, 411 U. S. 778, 785–789 (1973). In the case of school disciplinary proceedings, which are brief, informal, and intended in part to be educative, the Court also found no requirement for legal counsel. *Goss* v. *Lopez*, 419 U. S. 565, 583 (1975). Most recently, the Court declined to intrude the presence of counsel for a minor facing voluntary civil commitment by his parent, because of the parent's substantial role in that decision and because of the decision's essentially medical and informal nature. *Parham* v. *J. R.*, 442 U. S. 584, 604–609 (1979).

In each of these instances, the Court has recognized that

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[1] In *Scott* v. *Illinois*, 440 U. S. 367 (1979), the Court's analysis of Sixth Amendment jurisprudence led to the conclusion that the right to counsel is not constitutionally mandated when imprisonment is not actually imposed.

what process is due varies in relation to the interests at stake and the nature of the governmental proceedings. Where the individual's liberty interest is of diminished or less than fundamental stature, or where the prescribed procedure involves informal decisionmaking without the trappings of an adversarial trial-type proceeding, counsel has not been a requisite of due process. Implicit in this analysis is the fact that the contrary conclusion sometimes may be warranted. Where an individual's liberty interest assumes sufficiently weighty constitutional significance, and the State by a formal and adversarial proceeding seeks to curtail that interest, the right to counsel may be necessary to ensure fundamental fairness. See *In re Gault*, 387 U. S. 1 (1967). To say this is simply to acknowledge that due process allows for the adoption of different rules to address different situations or contexts.

It is not disputed that state intervention to terminate the relationship between petitioner and her child must be accomplished by procedures meeting the requisites of the Due Process Clause. Nor is there any doubt here about the kind of procedure North Carolina has prescribed. North Carolina law requires notice and a trial-type hearing before the State on its own initiative may sever the bonds of parenthood. The decisionmaker is a judge, the rules of evidence are in force, and the State is represented by counsel. The question, then, is whether proceedings in this mold, that relate to a subject so vital, can comport with fundamental fairness when the defendant parent remains unrepresented by counsel. As the Court today properly acknowledges, our consideration of the process due in this context, as in others, must rely on a balancing of the competing private and public interests, an approach succinctly described in *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976).[2] As does the majority, I

[2] See also *Little* v. *Streater*, *ante*, at 5–6, 13–16; *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 848–849 (1977); *Morrissey* v. *Brewer*,

evaluate the "three distinct factors" specified in *Eldridge:* the private interest affected; the risk of error under the procedure employed by the State; and the countervailing governmental interest in support of the challenged procedure.

A

At stake here is "the interest of a parent in the companionship, care, custody, and management of his or her children." *Stanley* v. *Illinois*, 405 U. S. 645, 651 (1972). This interest occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility. "[F]ar more precious . . . than property rights," *May* v. *Anderson*, 345 U. S. 528, 533 (1953), parental rights have been deemed to be among those "essential to the orderly pursuit of happiness by free men," *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923), and to be more significant and priceless than " 'liberties which derive merely from shifting economic arrangements.' " *Stanley* v. *Illinois*, 405 U. S., at 651, quoting *Kovacs* v. *Cooper*, 336 U. S. 77, 95 (1949) (Frankfurter, J., concurring). Accordingly, although the Constitution is verbally silent on the specific subject of families, freedom of personal choice in matters of family life long has been viewed as a fundamental liberty interest worthy of protection under the Fourteenth Amendment. *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 845 (1977); *Moore* v. *East Cleveland*, 431 U. S. 494, 499 (1977) (plurality opinion); *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535 (1925); *Meyer* v. *Nebraska*, 262 U. S., at 399. Within the general ambit of family integrity, the Court has accorded a high degree of constitutional respect to a natural parent's interest both in controlling the details of the child's upbring-

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408 U. S. 471, 481 (1972); *Goldberg* v. *Kelly*, 397 U. S. 254, 262–263 (1970); *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961).

ing, *Wisconsin* v. *Yoder*, 406 U. S. 205, 232–234 (1972); *Pierce* v. *Society of Sisters*, 268 U. S., at 534–535, and in retaining the custody and companionship of the child, *Smith* v. *Organization of Foster Families*, 431 U. S., at 842–847; *Stanley* v. *Illinois*, 405 U. S., at 651.

In this case, the State's aim is not simply to influence the parent-child relationship but to *extinguish* it. A termination of parental rights is both total and irrevocable.[3] Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child, to participate in, or even to know about, any important decision affecting the child's religious, educational, emotional, or physical development. It is hardly surprising that this forced dissolution of the parent-child relationship has been recognized as a punitive sanction by courts,[4] Congress,[5] and commenta-

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[3] Under North Carolina law, when a child is adjudged to be abused, neglected, or dependent, the dispositional alternatives are not couched in terms of permanence. See N. C. Gen. Stat. §§ 7A–647, 7A–651 (Supp. 1979). In contrast, the State's termination statute specifically provides that an order terminating parental rights "completely and permanently terminates all rights and obligations" between parent and child, except that the child's right of inheritance continues until such time as the child may be adopted. § 7A–289.33. Such absolute and total termination is not unusual. See, *e. g.*, Ariz. Rev. Stat. Ann. § 8–539 (1974); Cal. Civ. Code Ann. § 232.6 (West Supp. 1981); Ind. Code § 31–6–5–6 (a) (Supp. 1980); Ky. Rev. Stat. § 199.613 (2) (Supp. 1980); Mo. Rev. Stat. § 211.482 (Supp. 1980).

[4] *E. g.*, *Davis* v. *Page*, 640 F. 2d 599, 604 (CA5 1981) (en banc); *Brown* v. *Guy*, 476 F. Supp. 771, 773 (Nev. 1979); *State ex rel. Lemaster* v. *Oakley*, 157 W. Va. 590, 598, 203 S. E. 2d 140, 144 (1974); *Danforth* v. *State Dept. of Health & Welfare*, 303 A. 2d 794, 799–800 (Me. 1973); *In re Howard*, 382 So. 2d 194, 199 (La. App. 1980).

[5] See H. R. Rep. No. 95–1386, p. 22 (1978) ("removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty . . ."). This Report accompanied the Indian Child Welfare Act of 1978, Pub. L. 95–608, 92 Stat. 3069. Congress there provided for court-appointed counsel to indigent Indian parents facing a termination pro-

tors.[6] The Court candidly notes, as it must, *ante*, at 27, that termination of parental rights by the State is a "unique kind of deprivation."

The magnitude of this deprivation is of critical significance in the due process calculus, for the process to which an individual is entitled is in part determined "by the extent to which he may be 'condemned to suffer grievous loss.'" *Goldberg* v. *Kelly*, 397 U. S. 254, 263 (1970), quoting *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring). See *Little* v. *Streater*, *ante*, at 12; *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). Surely there can be few losses more grievous than the abrogation of parental rights. Yet the Court today asserts that this deprivation somehow is less serious than threatened losses deemed to require appointed counsel, because in this instance the parent's own "personal liberty" is not at stake.

I do not believe that our cases support the "presumption" asserted, *ante*, at 26–27, that physical confinement is the only loss of liberty grievous enough to trigger a right to appointed counsel under the Due Process Clause. Indeed, incarceration has been found to be neither a necessary nor a sufficient condition for requiring counsel on behalf of an indigent defendant. The prospect of canceled parole or probation, with its consequent deprivation of personal liberty, has not led the Court to require counsel for a prisoner facing a revocation proceeding. *Gagnon* v. *Scarpelli*, 411 U. S., at 785–789; *Morrissey* v. *Brewer*, 408 U. S., at 489. On the other hand, the fact that no new incarceration was threatened by a transfer from prison to a mental hospital did not preclude the Court's recognition of adverse changes in the conditions of

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ceeding. § 102 (b), 92 Stat. 3071, 25 U. S. C. § 1911 (b) (1976 ed., Supp. III).

[6] See, *e. g.*, Levine, Caveat Parens: A Demystification of the Child Protection System, 35 U. Pitt. L. Rev. 1, 52 (1973); Note, Child Neglect: Due Process for the Parent, 70 Colum. L. Rev. 465, 478 (1970); Representation in Child-Neglect Cases: Are Parents Neglected?, 4 Colum. J. L. & Soc. Prob. 230, 250 (1968) (Parent Representation Study).

confinement and of the stigma that presumably is associated with being labeled mentally ill. *Vitek* v. *Jones*, 445 U. S. 480, 492, 494 (1980). For four Members of the Court, these "other deprivations of liberty," coupled with the possibly diminished mental capacity of the prisoner, compelled the provision of counsel for any indigent prisoner facing a transfer hearing. *Id.*, at 496–497 (opinion of WHITE, J., joined by BRENNAN, MARSHALL, and STEVENS, JJ.).[7] See also *In re Gault*, 387 U. S., at 24–25.

Moreover, the Court's recourse to a "pre-eminent generalization," *ante*, at 25, misrepresents the importance of our flexible approach to due process. That approach consistently has emphasized attentiveness to the particular context. Once an individual interest is deemed sufficiently substantial or fundamental, determining the constitutional necessity of a requested procedural protection requires that we examine the nature of the proceeding—both the risk of error if the protection is not provided and the burdens created by its imposition.[8] Compare *Goldberg* v. *Kelly*, 397 U. S. 254 (1970),

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[7] JUSTICE POWELL agreed with the plurality that independent representation must be provided to an inmate facing involuntary transfer to a state mental hospital, but concluded that this representative need not be an attorney because the transfer hearing was informal and the central issue was a medical one. 445 U. S., at 498–500.

[8] By emphasizing the value of physical liberty to the exclusion of all other fundamental interests, the Court today grafts an unnecessary and burdensome new layer of analysis onto its traditional three-factor balancing test. Apart from improperly conflating two distinct lines of prior cases, see *supra*, at 35–38, the Court's reliance on a "rebuttable presumption" sets a dangerous precedent that may undermine objective judicial review regarding other procedural protections. Even in the area of juvenile court delinquency proceedings, where the threat of incarceration arguably supports an automatic analogy to the criminal process, the Court has eschewed a bright-line approach. Instead, it has evaluated each requested procedural protection in light of its consequences for fair play and truth determination. See generally *McKeiver* v. *Pennsylvania*, 403 U. S. 528 (1971); *In re Winship*, 397 U. S. 358 (1970); *In re Gault*, 387 U. S. 1 (1967).

with *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), and *Fuentes* v. *Shevin*, 407 U. S. 67 (1972), with *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600 (1974).

Rather than opting for the insensitive presumption that incarceration is the only loss of liberty sufficiently onerous to justify a right to appointed counsel, I would abide by the Court's enduring commitment to examine the relationships among the interests on both sides, and the appropriateness of counsel in the specific type of proceeding. The fundamental significance of the liberty interests at stake in a parental termination proceeding is undeniable, and I would find this first portion of the due process balance weighing heavily in favor of refined procedural protections. The second *Eldridge* factor, namely, the risk of error in the procedure provided by the State, must then be reviewed with some care.

B

The method chosen by North Carolina to extinguish parental rights resembles in many respects a criminal prosecution. Unlike the probation revocation procedure reviewed in *Gagnon* v. *Scarpelli*, on which the Court so heavily relies, the termination procedure is distinctly formal and adversarial. The State initiates the proceeding by filing a petition in district court, N. C. Gen. Stat. §§ 7A–289.23 and 7A–289.25 (Supp. 1979),[9] and serving a summons on the parent, § 7A–289.27 (1). A state judge presides over the adjudicatory hearing that follows, and the hearing is conducted pursuant to the formal rules of evidence and procedure. N. C. Rule Civ. Proc. 1, N. C. Gen. Stat. § 1A–1 (Supp. 1979). In gen-

[9] A petition for termination may also be filed by a private party, such as a judicially appointed guardian, a foster parent, or the other natural parent. N. C. Gen. Stat. § 7A–289.24 (Supp. 1979). Because the State in those circumstances may not be performing the same adversarial and accusatory role, an application of the three *Eldridge* factors might yield a different result with respect to the right to counsel.

eral, hearsay is inadmissible and records must be authenticated. See, *e. g.*, § 1A–1, Rules 1, 43, 44, 46.

In addition, the proceeding has an obvious accusatory and punitive focus. In moving to terminate a parent's rights, the State has concluded that it no longer will try to preserve the family unit, but instead will marshal an array of public resources to establish that the parent-child separation must be made permanent.[10] The State has legal representation through the county attorney. This lawyer has access to public records concerning the family and to professional social workers who are empowered to investigate the family situation and to testify against the parent. The State's legal representative may also call upon experts in family relations, psychology, and medicine to bolster the State's case. And, of course, the State's counsel himself is an expert in the legal standards and techniques employed at the termination proceeding, including the methods of cross-examination.

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[10] Significantly, the parent's rights and interests are not mentioned at all under the statement of purpose for the North Carolina termination statute. See N. C. Gen. Stat. § 7A–289.22 (Supp. 1979). In contrast, in abuse, neglect, and dependency proceedings the State has a statutory obligation to keep a family together whenever possible. § 7A–542. Thus, the State has chosen to provide counsel for parents, § 7A–587, in circumstances where it shares at least in part their interest in family integrity but not where it regards the parent as an opponent. The Assistant Attorney General of North Carolina explained the decision to furnish appointed counsel at the abuse and neglect stage by pointing to the State's need to avoid an awkward situation, given its possibly conflicting responsibilities to parent and child. Tr. of Oral Arg. 39–40. While this may be sound as a matter of public policy, it cannot excuse the failure to provide counsel at the termination stage, where the State and the indigent parent are adversaries, and the inequality of power and resources is starkly evident.

The possibility of providing counsel for the *child* at the termination proceeding has not been raised by the parties. That prospect requires consideration of interests different from those presented here, and again might yield a different result with respect to the right to counsel. See generally *Parham* v. *J. R.*, 442 U. S. 584 (1979); *Smith* v. *Organization of Foster Families*, 431 U. S. 816 (1977).

In each of these respects, the procedure devised by the State vastly differs from the informal and rehabilitative probation revocation decision in *Scarpelli*, the brief, educative school disciplinary procedure in *Goss*, and the essentially medical decision in *Parham*. Indeed, the State here has prescribed virtually all the attributes of a formal trial as befits the severity of the loss at stake in the termination decision—every attribute, that is, except counsel for the defendant parent. The provision of counsel for the parent would not alter the character of the proceeding, which is already adversarial, formal, and quintessentially legal. It, however, would diminish the prospect of an erroneous termination, a prospect that is inherently substantial, given the gross disparity in power and resources between the State and the uncounseled indigent parent.[11]

The prospect of error is enhanced in light of the legal standard against which the defendant parent is judged. As demonstrated here, that standard commonly adds another dimension to the complexity of the termination proceeding. Rather than focusing on the facts of isolated acts or omissions, the State's charges typically address the nature and quality of complicated ongoing relationships among parent, child, other relatives, and even unrelated parties. In the case at bar, the State's petition accused petitioner of two of the several grounds authorizing termination of parental rights under North Carolina law:

> "That [petitioner] has *without cause*, failed to establish or maintain *concern or responsibility* as to the child's welfare.
>
> . . . . .
>
> "That [petitioner] has *willfully* left the child in foster care for more than two consecutive years without show-

[11] Cf. *Parham* v. *J. R.*, 442 U. S., at 606–607; *Goldberg* v. *Kelly*, 397 U. S., at 266.

> ing that *substantial progress has been made* in correcting the conditions which led to the removal of the child [for neglect], or without showing a *positive response* to the *diligent efforts of the Department of Social Services* to strengthen her relationship to the child, or *to make and follow through with constructive planning* for the future of the child." (Emphasis supplied.) Juvenile Petition ¶¶ 6, 7, App. 3.[12]

The legal issues posed by the State's petition are neither simple nor easily defined. The standard is imprecise and open to the subjective values of the judge.[13] A parent seeking to prevail against the State must be prepared to adduce evidence about his or her personal abilities and lack of fault, as well as proof of progress and foresight as a parent that the State would deem adequate and improved over the situation underlying a previous adverse judgment of child neglect. The parent cannot possibly succeed without being able to identify material issues, develop defenses, gather and present

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[12] See N. C. Gen. Stat. §§ 7A-289.32 (1), 7A-289.32 (3) (Supp. 1977). Subdivision § 7A-289.32 (1) was repealed by 1979 N. C. Sess. Laws, ch. 669, § 2.

[13] Under North Carolina law, there is a further stage to the termination inquiry. Should the trial court determine that one or more of the conditions authorizing termination has been established, it then must consider whether the best interests of the child require maintenance of the parent-child relationship. N. C. Gen. Stat. § 7A-289.31 (a) (Supp. 1979).

This Court more than once has adverted to the fact that the "best interests of the child" standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values. See, *e. g., Smith* v. *Organization of Foster Families,* 431 U. S., at 835, n. 36; *Bellotti* v. *Baird,* 443 U. S. 622, 655 (1979) (STEVENS, J., concurring in judgment). See also *Quilloin* v. *Walcott,* 434 U. S. 246, 255 (1978). Several courts, perceiving similar risks, have gone so far as to invalidate parental termination statutes on vagueness grounds. See, *e. g., Alsager* v. *District Court of Polk Cty.,* 406 F. Supp. 10, 18–19 (SD Iowa 1975), aff'd on other grounds, 545 F. 2d 1137 (CA8 1976); *Davis* v. *Smith,* 266 Ark. 112, 121–123, 583 S. W. 2d 37, 42–43 (1979).

sufficient supporting nonhearsay evidence, and conduct cross-examination of adverse witnesses.

The Court, of course, acknowledges, *ante*, at 30, that these tasks "may combine to overwhelm an uncounseled parent." I submit that that is a profound understatement. Faced with a formal accusatory adjudication, with an adversary—the State—that commands great investigative and prosecutorial resources, with standards that involve ill-defined notions of fault and adequate parenting, and with the inevitable tendency of a court to apply subjective values or to defer to the State's "expertise," the defendant parent plainly is outstripped if he or she is without the assistance of "'the guiding hand of counsel.'" *In re Gault*, 387 U. S., at 36, quoting *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932). When the parent is indigent, lacking in education, and easily intimidated by figures of authority,[14] the imbalance may well become insuperable.

The risk of error thus is severalfold. The parent who actually has achieved the improvement or quality of parenting the State would require may be unable to establish this fact. The parent who has failed in these regards may be unable to demonstrate cause, absence of willfulness, or lack of agency diligence as justification. And errors of fact or law in the State's case may go unchallenged and uncorrected.[15] Given

[14] See Schetky, Angell, Morrison, & Sack, Parents Who Fail: A Study of 51 Cases of Termination of Parental Rights, 18 J. Am. Acad. Child Psych. 366, 375 (1979) (citing minimal educational backgrounds). See also *Davis* v. *Page*, 442 F. Supp. 258, 260 (SD Fla. 1977) (uncounseled parent, ignorant of governing substantive law, "was little more than a spectator in the adjudicatory [dependency] proceeding," and "sat silently through most of the hearing . . . fearful of antagonizing the social workers"), aff'd in part, 640 F. 2d 599 (CA5 1981) (en banc).

[15] See Parent Representation Study, at 241 (parents appearing in Kings County, N. Y., Family Court, charged with neglect and represented by counsel, had higher rate of dismissed petitions, 25% to 7.9%, and lower rate of neglect adjudications, 62.5% to 79.5%, than similarly charged parents appearing without counsel); Brief for Respondent 38–39, 25a–31a

the weight of the interests at stake, this risk of error assumes extraordinary proportions. By intimidation, inarticulateness, or confusion, a parent can lose forever all contact and involvement with his or her offspring.

C

The final factor to be considered, the interests claimed for the State, do not tip the scale against providing appointed counsel in this context. The State hardly is in a position to assert here that it seeks the informality of a rehabilitative or educative proceeding into which counsel for the parent would inject an unwelcome adversarial edge. As the Assistant Attorney General of North Carolina declared before this Court, once the State moves for termination, it "has made a decision that the child cannot go home and should not go home. It no longer has an obligation to try and restore that family." Tr. of Oral Arg. 40.

The State may, and does, properly assert a legitimate interest in promoting the physical and emotional well-being of its minor children. But this interest is not served by terminating the rights of any concerned, responsible parent. Indeed, because North Carolina is committed to "protect-[ing] all children from the unnecessary severance of a relationship with biological or legal parents," § 7A–289.22 (2), "the State spites its own articulated goals when it needlessly

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(study of state-initiated termination actions in 73 North Carolina counties; parent prevailed in 5.5% of proceedings where represented by counsel, and in 0.15% of proceedings where unrepresented).

While these statistics hardly are dispositive, I do not share the Court's view, *ante*, at 29–30, n. 5, that they are "unilluminating." Since no evidence in either study indicates that the defendant parent who can retain or is offered counsel is less culpable than the one who appears unrepresented, it seems reasonable to infer that a sizable number of cases against unrepresented parents end in termination solely because of the absence of counsel. In addition, as the Court acknowledges, *ante*, at 30, n. 5, the judges who preside over termination hearings perceive them as less fair when the parent is without counsel.

separates" the parent from the child. *Stanley* v. *Illinois*, 405 U. S., at 653.[16]

The State also has an interest in avoiding the cost and administrative inconvenience that might accompany a right to appointed counsel. But, as the Court acknowledges, the State's fiscal interest "is hardly significant enough to overcome private interests as important as those here." *Ante*, at 28. The State's financial concern indeed is a limited one, for the right to appointed counsel may well be restricted to those termination proceedings that are instituted by the State. Moreover, no difficult line-drawing problem would arise with respect to other types of civil proceedings. The instant due process analysis takes full account of the fundamental nature of the parental interest, the permanency of the threatened deprivation, the gross imbalance between the resources employed by the prosecuting State and those available to the indigent parent, and the relatively insubstantial cost of furnishing counsel. An absence of any one of these factors might yield a different result.[17] But where, as here, the threatened loss of liberty is severe and absolute, the State's role is so clearly adversarial and punitive, and the cost involved is relatively slight, there is no sound basis for refusing to recognize the right to counsel as a requisite of due process in a proceeding initiated by the State to terminate parental rights.

II

A

The Court's analysis is markedly similar to mine; it, too, analyzes the three factors listed in *Mathews* v. *Eldridge*, and it, too, finds the private interest weighty, the procedure devised by the State fraught with risks of error, and the coun-

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[16] The Court apparently shares this view. See *ante*, at 27–28.

[17] Thus, for example, the State's involvement in adjudicating the competing claims for child custody between parents in a divorce proceeding need not obligate it to provide counsel for indigent parents.

tervailing governmental interest insubstantial. Yet, rather than follow this balancing process to its logical conclusion, the Court abruptly pulls back and announces that a defendant parent must await a case-by-case determination of his or her need for counsel. Because the three factors "will not *always* be so distributed," reasons the Court, the Constitution should not be read to "requir[e] the appointment of counsel in *every* parental termination proceeding." *Ante*, at 31 (emphasis added). This conclusion is not only illogical, but it also marks a sharp departure from the due process analysis consistently applied heretofore. The flexibility of due process, the Court has held, requires case-by-case consideration of different decisionmaking *contexts*, not of different *litigants* within a given context. In analyzing the nature of the private and governmental interests at stake, along with the risk of error, the Court in the past has not limited itself to the particular case at hand. Instead, after addressing the three factors as generic elements in the context raised by the particular case, the Court then has formulated a rule that has general application to similarly situated cases.

The Court's own precedents make this clear. In *Goldberg* v. *Kelly*, the Court found that the desperate economic conditions experienced by welfare recipients *as a class* distinguished them from other recipients of governmental benefits. 397 U. S., at 264. In *Mathews* v. *Eldridge*, the Court concluded that the needs of Social Security disability recipients were *not* of comparable urgency, and, moreover, that existing pretermination procedures, based largely on written medical assessments, were likely to be more objective and even-handed than typical welfare entitlement decisions. 424 U. S., at 339–345. These cases established rules translating due process in the welfare context as requiring a pretermination hearing but dispensing with that requirement in the disability benefit context. A showing that a particular welfare recipient had access to additional income, or that a disability recipient's eligibility turned on testimony rather than

written medical reports, would not result in an exception from the required procedural norms. The Court reasoned in *Eldridge:*

> "To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." *Id.*, at 344.

There are sound reasons for this. Procedural norms are devised to ensure that justice may be done in every case, and to protect litigants against unpredictable and unchecked adverse governmental action. Through experience with decisions in varied situations over time, lessons emerge that reflect a general understanding as to what is minimally necessary to assure fair play. Such lessons are best expressed to have general application which guarantees the predictability and uniformity that underlie our society's commitment to the rule of law. By endorsing, instead, a retrospective review of the trial record of each particular defendant parent, the Court today undermines the very rationale on which this concept of general fairness is based.[18]

Moreover, the case-by-case approach advanced by the Court itself entails serious dangers for the interests at stake and the general administration of justice. The Court assumes that a review of the record will establish whether a defendant, proceeding without counsel, has suffered an un-

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[18] The Court's decision in *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973), is not to the contrary. In *Scarpelli*, the Court determined that due process requires an individualized approach to requests for counsel by probationers facing revocation. The rule established there was based on respect for the rehabilitative focus of the probation system, the informality of probation proceedings, and the diminished liberty interest of an already-convicted probationer. *Id*, at 785–789. None of these elements is present here. See also *Wolff* v. *McDonnell*, 418 U. S. 539, 569–570 (1974).

fair disadvantage. But in the ordinary case, this simply is not so. The pleadings and transcript of an uncounseled termination proceeding at most will show the obvious blunders and omissions of the defendant parent. Determining the difference legal representation would have made becomes possible only through imagination, investigation, and legal research focused on the particular case. Even if the reviewing court can embark on such an enterprise in each case, it might be hard pressed to discern the significance of failures to challenge the State's evidence or to develop a satisfactory defense. Such failures, however, often cut to the essence of the fairness of the trial, and a court's inability to compensate for them effectively eviscerates the presumption of innocence. Because a parent acting *pro se* is even more likely to be unaware of controlling legal standards and practices, and unskilled in garnering relevant facts, it is difficult, if not impossible, to conclude that the typical case has been adequately presented. Cf. *Betts* v. *Brady*, 316 U. S., at 476 (dissenting opinion).[19]

Assuming that this ad hoc review were adequate to ensure fairness, it is likely to be both cumbersome and costly. And because such review involves constitutional rights implicated by state adjudications, it necessarily will result in increased federal interference in state proceedings. The Court's implication to the contrary, see *ante*, at 33, is belied by the Court's experience in the aftermath of *Betts* v. *Brady*. The Court was confronted with innumerable postverdict challenges to the fairness of particular trials, and expended much

[19] Of course, the case-by-case approach announced by the Court today places an even heavier burden on the trial court, which will be required to determine in advance what difference legal representation might make. A trial judge will be obligated to examine the State's documentary and testimonial evidence well before the hearing so as to reach an informed decision about the need for counsel in time to allow adequate preparation of the parent's case.

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energy in effect evaluating the performance of state judges.[20] This level of intervention in the criminal processes of the States prompted Justice Frankfurter, speaking for himself and two others, to complain that the Court was performing as a "super-legal-aid bureau." *Uveges* v. *Pennsylvania*, 335 U. S. 437, 450 (1948) (dissenting opinion). I fear that the decision today may transform the Court into a "super family court."

B

The problem of inadequate representation is painfully apparent in the present case. Petitioner, Abby Gail Lassiter, is the mother of five children. The State moved to remove the fifth child, William, from petitioner's care on the grounds of parental neglect. Although petitioner received notice of the removal proceeding, she did not appear at the hearing and was not represented. In May 1975, the State's District Court adjudicated William to be neglected under North Carolina law and placed him in the custody of the Durham County Department of Social Services. At some point, petitioner evidently arranged for the other four children to reside with and be cared for by her mother, Mrs. Lucille Lassiter. They remain under their grandmother's care at the present time.

As the Court notes, *ante*, at 22, petitioner did not visit William after July 1976. She was unable to do so, for she was imprisoned as a result of her conviction for second-degree murder. In December 1977, she was visited in prison by a Durham County social worker who advised her that the Department planned to terminate her parental rights with respect to William. Petitioner immediately expressed strong

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[20] See, *e. g.*, *Quicksall* v. *Michigan*, 339 U. S. 660 (1950); *Uveges* v. *Pennsylvania*, 335 U. S. 437 (1948); *Bute* v. *Illinois*, 333 U. S. 640 (1948); *Marino* v. *Ragen*, 332 U. S. 561 (1947); *Hawk* v. *Olson*, 326 U. S. 271 (1945); *Tomkins* v. *Missouri*, 323 U. S. 485 (1945). See generally W. Beaney, The Right to Counsel in American Courts 160–198 (1955).

opposition to that plan and indicated a desire to place the child with his grandmother. Hearing Tr. 15. After receiving a summons, a copy of the State's termination petition, and notice that a termination hearing would be held in August 1978, petitioner informed her prison guards about the legal proceeding. They took no steps to assist her in obtaining legal representation, *id.*, at 4; App. I to Reply to Brief in Opposition 4, nor was she informed that she had a right to counsel.[21] Under these circumstances, it scarcely would be appropriate, or fair, to find that petitioner had knowingly and intelligently waived a right to counsel.

At the termination hearing, the State's sole witness was the county worker who had met petitioner on the one occasion at the prison. This worker had been assigned to William's case in August 1977, yet much of her testimony concerned events prior to that date; she represented these events as contained in the agency record. Hearing Tr. 10–13. Petitioner failed to uncover this weakness in the worker's testimony. That is hardly surprising, for there is no indication that an agency record was introduced into evidence or was present in court, or that petitioner or the grandmother ever had an opportunity to review any such record. The social worker also testified about her conversations with members of the community. In this hearsay testimony, the witness reported the opinion of others that the grandmother could not handle the additional responsibility of caring for the fifth child. *Id.*, at 14–15. There is no indication that these community members were unavailable to testify, and the County Attorney did not justify the admission of the hearsay. Petitioner made no objection to its admission.

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[21] During her imprisonment, petitioner had spoken with an attorney concerning her criminal conviction. She did not discuss the termination proceeding with this lawyer, and he has stated under oath that in view of her indigency he would not have been interested in representing her at that proceeding even had she asked him to do so. App. 10–11, 16.

The court gave petitioner an opportunity to cross-examine the social worker, *id.*, at 19, but she apparently did not understand that cross-examination required questioning rather than declarative statements. At this point, the judge became noticeably impatient with petitioner.[22] Petitioner then

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[22] Hearing Tr. 19–20:

"THE COURT: All right. Do you want to ask her any questions?

"[PETITIONER]: About what? About what she—

"THE COURT: About this child.

"[PETITIONER]: Oh, yes.

"THE COURT: All right. Go ahead.

"[PETITIONER]: The only thing I know is that when you say—

"THE COURT: I don't want you to testify.

"[PETITIONER]: Okay.

"THE COURT: I want to know whether you want to cross-examine her or ask any questions.

"[PETITIONER]: Yes, I want to. Well, you know, the only thing I know about is my part that I know about it. I know—

"THE COURT: I am not talking about what you know. I want to know if you want to ask her any questions or not.

"[PETITIONER]: About that?

"THE COURT: Yes. Do you understand the nature of this proceeding?

"[PETITIONER]: Yes.

"THE COURT: And that is to terminate any rights you have to the child and place it for adoption, if necessary.

"[PETITIONER]: Yes, I know.

"THE COURT: Are there any questions you want to ask her about what she has testified to?

"[PETITIONER]: Yes.

"THE COURT: All right. Go ahead.

"[PETITIONER]: I want to know why you think you are going to turn my child over to a foster home? He knows my mother and he knows all of us. He knows her and he knows all of us.

"THE COURT: Who is he?

"[PETITIONER]: My son, William.

"[SOCIAL WORKER]: Ms. Lassiter, your son has been in foster care since May of 1975 and since that time—

"[PETITIONER]: Yeah, yeah and I didn't know anything about it either."

took the stand, and testified that she wanted William to live with his grandmother and his siblings. The judge questioned her for a brief period, and expressed open disbelief at one of her answers.[23] The final witness was the grandmother. Both the judge and the County Attorney questioned her. She denied having expressed unwillingness to take William into her home, and vehemently contradicted the social worker's statement that she had complained to the Department about her daughter's neglect of the child.[24] Petitioner was not told that she could question her mother, and did not do so.[25] The County Attorney made a closing argument, *id.*, at 58–60,

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[23] *Id.*, at 30:

"[THE COURT]: Did you know that your mother filed a complaint on the 8th day of May, 1975 . . . . ?

"A: No, 'cause she said she didn't file no complaint.

"[THE COURT]: That was some ghost who came up here and filed it I suppose."

The judge concluded his questioning by saying to the County Attorney: "All right, Mr. Odom, see what you can do." *Id.*, at 36.

[24] This latter denial produced the following reaction from the court, *id.*, at 55:

"Q [from respondent]: Did you tell Ms. Mangum on the 8th day of May, 1975, that when your daughter was in the hospital having William that she left the children in the cold house with no heat?

"A: No, sir, no, sir, unh unh, no, sir.

"[PETITIONER]: That's a lie.

"A: No, sir, no, sir. God knows, I'll raise my right hand to God and die saying that. Somebody else told that.

"THE COURT: I wish you wouldn't talk like that it scares me to be in the same room with you."

[25] The judge had initiated the examination of Mrs. Lassiter; subsequently he expressed exasperation with the rambling quality of her answers, *id.*, at 52:

"THE COURT: I tell you what, let's just stop all this. You question her, please. Just answer his questions. We'll be here all day at this rate. I mean, we are just wasting time, we're skipping from one subject to another—

"CROSS EXAMINATION BY [RESPONDENT]; . . . ."

and the judge then asked petitioner if she had any final remarks. She responded: "Yes. I don't think its right." *Id.*, at 61.

It is perhaps understandable that the District Court Judge experienced difficulty and exasperation in conducting this hearing. But both the difficulty and the exasperation are attributable in large measure, if not entirely, to the lack of counsel. An experienced attorney might have translated petitioner's reaction and emotion into several substantive legal arguments. The State charged petitioner with failing to arrange a "constructive plan" for her child's future or to demonstrate a "positive response" to the Department's intervention. A defense would have been that petitioner had arranged for the child to be cared for properly by his grandmother, and evidence might have been adduced to demonstrate the adequacy of the grandmother's care of the other children. See, *e. g.*, *In re Valdez*, 29 Utah 2d 63, 504 P. 2d 1372 (1973); *Welfare Commissioner* v. *Anonymous*, 33 Conn. Supp. 100, 364 A. 2d 250 (1976); *Diernfeld* v. *People*, 137 Colo. 238, 323 P. 2d 628 (1958). See generally *Moore* v. *East Cleveland*, 431 U. S., at 504 (plurality opinion); *id.*, at 508–510 (opinion of BRENNAN, J.). The Department's own "diligence" in promoting the family's integrity was never put in issue during the hearing, yet it is surely significant in light of petitioner's incarceration and lack of access to her child. See, *e. g.*, *Weaver* v. *Roanoke Dept. of Human Resources*, 220 Va. 921, 929, 265 S. E. 2d 692, 697 (1980); *In re Christopher H.*, 577 P. 2d 1292, 1294 (Okla. 1978); *In re Kimberly I.*, 72 App. Div. 2d 831, 833, 421 N. Y. S. 2d 649, 651 (1979). Finally, the asserted willfulness of petitioner's lack of concern could obviously have been attacked since she was physically unable to regain custody or perhaps even to receive meaningful visits during 21 of the 24 months preceding the action. Cf. *In re Dinsmore*, 36 N. C. App. 720, 245 S. E. 2d 386 (1978).

III

Petitioner plainly has not led the life of the exemplary citizen or model parent. It may well be that if she were accorded competent legal representation, the ultimate result in this particular case would be the same. But the issue before the Court is not petitioner's character; it is whether she was given a meaningful opportunity to be heard when the State moved to terminate absolutely her parental rights.[26] In light of the unpursued avenues of defense, and of the experience petitioner underwent at the hearing, I find virtually incredible the Court's conclusion today that her termination proceeding was fundamentally fair. To reach that conclusion, the Court simply ignores the defendant's obvious inability to speak effectively for herself, a factor the Court has found to be highly significant in past cases. See *Gagnon* v. *Scarpelli*, 411 U. S., at 791; *Uveges* v. *Pennsylvania*, 335 U. S., at 441–442; *Bute* v. *Illinois*, 333 U. S. 640, 677 (1948). See also *Vitek* v. *Jones*, 445 U. S., at 496–497 (plurality opinion); *id.*, at 498 (opinion of POWELL, J.). I am unable to ignore that factor; instead, I believe that the record, and the norms of

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[26] Unfortunately, the Court does not confine itself to the issue at hand. By going outside the official record of this case, *ante*, at 20–21, n. 1, to unearth and recite details of petitioner's second-degree murder conviction set forth in an unpublished state appellate opinion, see *State* v. *Lassiter*, 33 N. C. App. 405, 235 S. E. 2d 289 (1977); Rule 30 (e)(3), N. C. Rules of Appellate Procedure, N. C. Gen. Stat. (Supp. 1979 to vol. 4A), the Court apparently believes it has contributed evidence relevant to petitioner's fitness as a parent, and perhaps to the fitness of petitioner's mother as well. But while some States retain statutes permitting parental rights to be terminated upon a parent's criminal conviction, North Carolina is not among them. See N. C. Gen. Stat. § 7A–289.32 (Supp. 1979). See Note, On Prisoners and Parenting: Preserving the Tie that Binds, 87 Yale L. J. 1408, 1409–1410 (1978). Reliance on such evidence is likely to encourage the kind of subjective value judgments that an adversarial judicial proceeding is meant to avoid.

fairness acknowledged by the majority, compel a holding according counsel to petitioner and persons similarly situated.

Finally, I deem it not a little ironic that the Court on this very day *grants*, on due process grounds, an indigent putative father's claim for state-paid blood grouping tests in the interest of according him a meaningful opportunity to disprove his paternity, *Little* v. *Streater*, *ante*, p. 1, but in the present case *rejects*, on due process grounds, an indigent mother's claim for state-paid legal assistance when the State seeks to take her own child away from her in a termination proceeding. In *Little* v. *Streater*, the Court stresses and relies upon the need for "procedural fairness," the "compelling interest in the accuracy of [the] determination," the "not inconsiderable" risk of error, the indigent's "fac[ing] the State as an adversary," and "fundamental fairness," *ante*, at 13, 14, and 16.

There is some measure of inconsistency and tension here, it seems to me. I can attribute the distinction the Court draws only to a presumed difference between what it views as the "civil" and the "quasi-criminal," *Little* v. *Streater*, *ante*, at 10. Given the factual context of the two cases decided today, the significance of that presumed difference eludes me.

Ours, supposedly, is "a maturing society," *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion), and our notion of due process is, "perhaps, the least frozen concept of our law." *Griffin* v. *Illinois*, 351 U. S. 12, 20 (1956) (opinion concurring in judgment). If the Court in *Boddie* v. *Connecticut*, 401 U. S. 371 (1971), was able to perceive as constitutionally necessary the access to judicial resources required to dissolve a marriage at the behest of private parties, surely it should perceive as similarly necessary the requested access to legal resources when the State itself seeks to dissolve the intimate and personal family bonds between parent and child. It will not open the "floodgates" that, I suspect, the Court

fears. On the contrary, we cannot constitutionally afford the closure that the result in this sad case imposes upon us all.

I respectfully dissent.

JUSTICE STEVENS, dissenting.

A woman's misconduct may cause the State to take formal steps to deprive her of her liberty. The State may incarcerate her for a fixed term and also may permanently deprive her of her freedom to associate with her child. The former is a pure deprivation of liberty; the latter is a deprivation of both liberty and property, because statutory rights of inheritance as well as the natural relationship may be destroyed. Although both deprivations are serious, often the deprivation of parental rights will be the more grievous of the two. The plain language of the Fourteenth Amendment commands that both deprivations must be accompanied by due process of law.*

Without so stating explicitly, the Court appears to treat this case as though it merely involved the deprivation of an interest in property that is less worthy of protection than a person's liberty. The analysis employed in *Mathews* v. *Eldridge*, 424 U. S. 319, in which the Court balanced the costs and benefits of different procedural mechanisms for allocating a finite quantity of material resources among competing claimants, is an appropriate method of determining what process is due in property cases. Meeting the Court on its own terms, JUSTICE BLACKMUN demonstrates that the *Mathews* v. *Eldridge* analysis requires the appointment of counsel in this type of case. I agree with his conclusion, but I would take one further step.

In my opinion the reasons supporting the conclusion that the Due Process Clause of the Fourteenth Amendment en-

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*The Fourteenth Amendment provides in part:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

titles the defendant in a criminal case to representation by counsel apply with equal force to a case of this kind. The issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits. Accordingly, even if the costs to the State were not relatively insignificant but rather were just as great as the costs of providing prosecutors, judges, and defense counsel to ensure the fairness of criminal proceedings, I would reach the same result in this category of cases. For the value of protecting our liberty from deprivation by the State without due process of law is priceless.

Syllabus

SCHAD ET AL. *v.* BOROUGH OF MOUNT EPHRAIM

APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

No. 79–1640. Argued February 25, 1981—Decided June 1, 1981

Appellants operate an adult bookstore in the commercial zone of appellee borough, and the store contains licensed coin-operated devices that display adult films. When appellants added a coin-operated mechanism permitting a customer to watch a usually nude live dancer, complaints were filed against them charging that the exhibition of live dancing violated an ordinance that restricted uses permitted in a commercial zone, and they were convicted. Rejecting appellants' defense based on the First and Fourteenth Amendments, the trial court, while recognizing that live nude dancing is protected by the First Amendment, held that First Amendment guarantees were not involved, since the case involved solely a zoning ordinance under which live entertainment, whether a nude dance or some other form of live presentation, was not a permitted use in any establishment in the borough. The Appellate Division of the New Jersey Superior Court affirmed, and the New Jersey Supreme Court denied further review.

Held: Appellants' convictions are invalid under the First and Fourteenth Amendments for appellee failed to justify the exclusion of live entertainment from the broad range of commercial uses permitted in the borough. Pp. 65–77.

(a) The ordinance in question, as construed by the New Jersey courts to exclude live entertainment, including nude dancing, throughout the borough, prohibits a wide range of expression that has long been held to be within the protection of the First and Fourteenth Amendments. An entertainment program may not be prohibited solely because it displays a nude human figure, and nude dancing is not without its First Amendment protection from official regulation. Pp. 65–66.

(b) The First Amendment requires sufficient justification for the exclusion of a broad category of protected expression from the permitted commercial uses, and none of appellee's asserted justifications withstands scrutiny. Its asserted justification that permitting live entertainment would conflict with its plan to create a commercial area catering only to the residents' "immediate needs," is patently insufficient. As to its asserted justification that live entertainment may be selectively excluded from the permitted commercial uses to avoid problems associated with live entertainment, such as parking, trash, police protection,

and medical facilities, appellee has presented no evidence that live entertainment poses problems of this nature more significant than those associated with various permitted uses, or that its interests could not be met by restrictions that are less intrusive on protected forms of expression. And as to the claimed justification that the ordinance in question is a reasonable "time, place, and manner" restriction, appellee does not identify its interests making it reasonable to exclude all live entertainment but to allow a variety of other commercial uses, and has presented no evidence that live entertainment is incompatible with the permitted uses. Pp. 67–77.

Reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, BLACKMUN, and POWELL, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 77. POWELL, J., filed a concurring opinion, in which STEWART, J., joined, *post*, p. 79. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 79. BURGER, C. J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 85.

Robert E. Levy argued the cause for appellants. With him on the brief was *Lewis H. Robertson*.

Arnold N. Fishman argued the cause and filed a brief for appellee.*

JUSTICE WHITE delivered the opinion of the Court.

In 1973, appellants began operating an adult bookstore in the commercial zone in the Borough of Mount Ephraim in Camden County, N. J. The store sold adult books, magazines, and films. Amusement licenses shortly issued permitting the store to install coin-operated devices by virtue of which a customer could sit in a booth, insert a coin, and watch an adult film. In 1976, the store introduced an additional coin-operated mechanism permitting the customer to watch a live dancer, usually nude, performing behind a glass panel.

**Bruce J. Ennis* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Anthony H. Atlas filed a brief for Morality in Media, Inc., as *amicus curiae* urging affirmance.

Complaints were soon filed against appellants charging that the bookstore's exhibition of live dancing violated § 99–15B of Mount Ephraim's zoning ordinance, which described the permitted uses in a commercial zone,[1] in which the store was located, as follows:

> "B. Principal permitted uses on the land and in buildings.
>
> "(1) Offices and banks; taverns; restaurants and luncheonettes for sit-down dinners only and with no drive-in facilities; automobile sales; retail stores, such as but not limited to food, wearing apparel, millinery, fabrics, hardware, lumber, jewelry, paint, wallpaper, appliances, flowers, gifts, books, stationery, pharmacy, liquors, cleaners, novelties, hobbies and toys; repair shops for shoes, jewels, clothes and appliances; barbershops and beauty salons; cleaners and laundries; pet stores; and nurseries. Offices may, in addition, be permitted to a group of four (4) stores or more without additional parking, provided the offices do not exceed the equivalent of twenty percent (20%) of the gross floor area of the stores.
>
> "(2) Motels." Mount Ephraim Code § 99–15B (1), (2) (1979).[2]

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[1] The zoning ordinance establishes three types of zones. The "R–1" residential district is zoned for single-family dwellings. The "R–2" residential district is zoned for single-family dwellings, townhouses, and garden apartments. The "C" district is zoned for commercial use, as specified in § 99–15 of the Mount Ephraim Code. See Mount Ephraim Code § 99–7 (1979).

[2] Section 99–15A states the purpose of the commercial zone:

"A. Purpose. The purpose of this district is to provide areas for local and regional commercial operations. The zone district pattern recognizes the strip commercial pattern which exists along Kings Highway and the Black Horse Pike. It is intended, however, to encourage such existing uses and any new uses or redevelopment to improve upon the zoning districts of greater depth by encouraging shopping-center-type development with buildings related to each other in design, landscaping and site planning and by requiring off-street parking, controlled ingress and egress,

Section 99–4 of the Borough's code provided that "[a]ll uses not expressly permitted in this chapter are prohibited."

Appellants were found guilty in the Municipal Court and fines were imposed. Appeal was taken to the Camden County Court, where a trial *de novo* was held on the record made in the Municipal Court and appellants were again found guilty. The County Court first rejected appellants' claim that the ordinance was being selectively and improperly enforced against them because other establishments offering live entertainment were permitted in the commercial zones.[3] Those establishments, the court held, were permitted, nonconforming uses that had existed prior to the passage of the ordinance. In response to appellants' defense based on the First and Fourteenth Amendments, the court recognized that "live nude dancing is protected by the First Amendment" but was of the view that "First Amendment guarantees are not involved" since the case "involves solely a zoning ordinance" under which "[l]ive entertainment is simply not a permitted use in any establishment" whether the entertainment is a nude dance or some other form of live presentation. App. to Juris. Statement 8a, 12a. Reliance was placed on the statement in *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 62 (1976), that "[t]he mere fact that the commercial exploitation of material protected by the First Amendment is

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greater building setbacks, buffer areas along property lines adjacent to residential uses, and a concentration of commercial uses into fewer locations to eliminate the strip pattern."

[3] The building inspector, who is responsible for enforcing the zoning ordinance, testified that three establishments located in commercial zones of the Borough offered live music. However, he stated that they were permitted to do so only because this use of the premises preceded the enactment of the zoning ordinance and thus qualified as a "nonconforming" use under the ordinance. Munic. Ct. Tr. 21–25, 35–36, 55–59.

The Police Chief also testified. He stated that he knew of no live entertainment in the commercial zones other than that offered by appellants and by the three establishments mentioned by the building inspector. *Id.*, at 67.

subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." The Appellate Division of the Superior Court of New Jersey affirmed appellants' convictions in a *per curiam* opinion "essentially for the reasons" given by the County Court. App. to Juris. Statement 14a. The Supreme Court of New Jersey denied further review. *Id.*, at 17a, 18a.

Appellants appealed to this Court. Their principal claim is that the imposition of criminal penalties under an ordinance prohibiting all live entertainment, including nonobscene, nude dancing, violated their rights of free expression guaranteed by the First and Fourteenth Amendments of the United States Constitution.[4] We noted probable jurisdiction, 449 U. S. 897 (1980), and now set aside appellants' convictions.

I

As the Mount Ephraim Code has been construed by the New Jersey courts—a construction that is binding upon us—"live entertainment," including nude dancing, is "not a permitted use in any establishment" in the Borough of Mount Ephraim. App. to Juris. Statement 12a. By excluding live entertainment throughout the Borough, the Mount Ephraim ordinance prohibits a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments. Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee. *Joseph Burstyn, Inc.* v. *Wilson*, 343

[4] Appellants also contend that the zoning ordinance, as applied to them, violates due process and equal protection, since the Borough has acted arbitrarily and irrationally in prohibiting booths in which customers can view live nude dancing while permitting coin-operated movie booths. Since we sustain appellants' First Amendment challenge to the ordinance, we do not address these additional claims.

U. S. 495 (1952); *Schacht* v. *United States*, 398 U. S. 58 (1970); *Jenkins* v. *Georgia*, 418 U. S. 153 (1974); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975); *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205 (1975); *Doran* v. *Salem Inn, Inc.* 422 U. S. 922 (1975). See also *California* v. *LaRue*, 409 U. S. 109, 118 (1972); *Young* v. *American Mini Theatres, Inc.*, *supra*, at 61, 62. Nor may an entertainment program be prohibited solely because it displays the nude human figure. "[N]udity alone" does not place otherwise protected material outside the mantle of the First Amendment. *Jenkins* v. *Georgia*, *supra*, at 161; *Southeastern Promotions, Ltd.* v. *Conrad*, *supra*; *Erznoznik* v. *City of Jacksonville*, *supra*, at 211–212, 213. Furthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation. *Doran* v. *Salem Inn, Inc.*, *supra*; *Southeastern Promotions, Ltd.* v. *Conrad*, *supra*; *California* v. *LaRue*, *supra*.

Whatever First Amendment protection should be extended to nude dancing, live or on film, however, the Mount Ephraim ordinance prohibits all live entertainment in the Borough: no property in the Borough may be principally used for the commercial production of plays, concerts, musicals, dance, or any other form of live entertainment.[5] Because appellants' claims are rooted in the First Amendment, they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own. "Because overbroad laws, like vague ones, deter privileged activit[ies], our cases firmly establish appellant's standing to raise an overbreadth challenge." *Grayned* v. *City of Rockford*, 408 U. S. 104, 114 (1972).

[5] The Borough's counsel asserted at oral argument that the ordinance would not prohibit noncommercial live entertainment, such as singing Christmas carols at an office party. Tr. of Oral Arg. 33. Apparently a high school could perform a play if it did not charge admission. However, the ordinance prohibits the production of plays in commercial theaters. *Id.*, at 34.

II

The First Amendment requires that there be sufficient justification for the exclusion of a broad category of protected expression as one of the permitted commercial uses in the Borough. The justification does not appear on the face of the ordinance since the ordinance itself is ambiguous with respect to whether live entertainment is permitted: § 99–15B purports to specify only the "principal" permitted uses in commercial establishments, and its listing of permitted retail establishments is expressly nonexclusive; yet, § 99–4 declares that all uses not expressly permitted are forbidden.[6] The state courts at least partially resolved the ambiguity by declaring live entertainment to be an impermissible commercial use. In doing so, the County Court, whose opinion was adopted by the Appellate Division of the Superior Court, sought to avoid or

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[6] Service stations are not listed as principal permitted uses in § 99–15B. However, both § 99–15E ("Area and yard requirements") and § 99–15F ("Minimum off-street parking") specifically refer to service stations, and § 99–15J limits the construction or expansion of service stations in a designated area of the commercial district. Service stations would thus appear to be permitted uses even though not expressly listed in § 99–15B.

Various official views have been expressed as to what extent entertainment is excluded from the commercial zone. At the initial evidentiary hearing, the prosecutor suggested that the ordinance only banned *"live* entertainment" in commercial establishments. Munic. Ct. Tr. 49 (emphasis added). By contrast, the building inspector for the Borough stated that there was no basis for distinguishing between live entertainment and other entertainment under the ordinance. *Id.*, at 20, 50. Before this Court, the Borough asserted in its brief that the ordinance "does not prohibit all entertainment, but only live entertainment," Brief for Appellee 21, yet counsel for the Borough stated during oral argument that the ordinance prohibits commercial establishments from offering any entertainment. Tr. of Oral Arg. 40. The County Court ruled that "live entertainment" is not a permitted use under § 99–15B, but it did not consider whether nonlive entertainment might be a permitted use. At oral argument, counsel for appellants referred to a movie theater in the Borough, Tr. of Oral Arg. 9, but counsel for the Borough explained that it is permitted only because it is a nonconforming use. *Id.*, at 28, 38–40.

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to meet the First Amendment issue only by declaring that the restriction on the use of appellants' property was contained in a zoning ordinance that excluded all live entertainment from the Borough, including live nude dancing.

The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. But the zoning power is not infinite and unchallengeable; it "must be exercised within constitutional limits." *Moore* v. *East Cleveland*, 431 U. S. 494, 514 (1977) (STEVENS, J., concurring in judgment). Accordingly, it is subject to judicial review; and as is most often the case, the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed. *Thomas* v. *Collins*, 323 U. S. 516, 529–530 (1945).

Where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property. *Agins* v. *City of Tiburon*, 447 U. S. 255, 260 (1980); *Village of Belle Terre* v. *Boraas*, 416 U. S. 1 (1974); *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 395 (1926). But an ordinance may fail even under that limited standard of review. *Moore* v. *East Cleveland*, *supra*, at 520 (STEVENS, J., concurring in judgment); *Nectow* v. *Cambridge*, 277 U. S. 183 (1928).

Beyond that, as is true of other ordinances, when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest.[7] In *Schneider* v. *State*, 308 U. S. 147 (1939), for ex-

[7] In *Village of Belle Terre* v. *Boraas*, 416 U. S. 1 (1974), the Court upheld a zoning ordinance that restricted the use of land to "one-family" dwellings. The Court concluded that the municipality's definition of a

ample, the Court recognized its obligation to assess the substantiality of the justification offered for a regulation that significantly impinged on freedom of speech:

> "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.

"family" (no more than two unrelated persons) did not burden any fundamental right guaranteed by the Constitution. *Id.*, at 7. Thus, it merely had to bear a rational relationship to a permissible state objective. *Id.*, at 8. JUSTICE MARSHALL dissented, asserting that the ordinance impinged on fundamental personal rights:

"[Thus,] it can withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest . . . . [T]he onus of demonstrating that no less intrusive means will adequately protect the compelling state interest and that the challenged statute is sufficiently narrowly drawn, is upon the party seeking to justify the burden." *Id.*, at 18 (citation omitted).

Moore v. *East Cleveland*, 431 U. S. 494 (1977), like *Belle Terre*, involved an ordinance that limited the occupancy of each dwelling to a single family. Unlike the ordinance challenged in *Belle Terre*, however, this ordinance defined "family" in a manner that prevented certain relatives from living together. JUSTICE POWELL, joined by three other Justices, concluded that the ordinance impermissibly impinged upon protected liberty interests. 431 U. S., at 499. JUSTICE STEVENS concluded that the ordinance did not even survive the *Euclid* test. 431 U. S., at 520–521. The dissenting opinions did not contend that zoning ordinances must always be deferentially reviewed. Rather, the dissenting Justices who addressed the issue rejected the view that the ordinance impinged upon interests that required heightened protection under the Due Process Clause. *Id.*, at 537 (STEWART, J., joined by REHNQUIST, J., dissenting), *id.*, at 549 (WHITE, J., dissenting).

Even where a challenged regulation restricts freedom of expression only incidentally or only in a small number of cases, we have scrutinized the governmental interest furthered by the regulation and have stated that the regulation must be narrowly drawn to avoid unnecessary intrusion on freedom of expression. See *United States* v. *O'Brien*, 391 U. S. 367, 376–377 (1968).

> And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of [First Amendment] rights." *Id.*, at 161.[8]

Similarly, in *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 637 (1980),[9] it was emphasized that the Court must not only assess the substantiality of the governmental interests asserted but also determine whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment:

> "The Village may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. *Hynes* v. *Mayor of Oradell*, 425 U. S., at 620; *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 786 (1978). 'Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone. . . .' *NAACP* v. *Button*, 371 U. S. 415, 438 (1963)."

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[8] Several municipalities argued in *Schneider* that their antileafletting ordinances were designed to prevent littering of the streets. The Court did not deny that the ordinances would further that purpose, but it concluded that the cities' interest in preventing littering was not sufficiently strong to justify the limitation on First Amendment rights. The Court pointed out that the cities were free to pursue other methods of preventing littering, such as punishing those who actually threw papers on the streets. 308 U. S., at 162.

[9] *Village of Schaumburg* invalidated on First Amendment grounds a municipal ordinance prohibiting the solicitation of contributions by charitable organizations that did not use at least 75% of their receipts for "charitable purposes." Although recognizing that the Village had substantial interests "'in protecting the public from fraud, crime, and undue annoyance,'" 444 U. S., at 636, we found these interests were "only peripherally promoted by the 75-percent requirement and could be sufficiently served by measures less destructive of First Amendment interests." *Ibid.*

JUSTICE POWELL said much the same thing in addressing the validity of a zoning ordinance in *Moore* v. *East Cleveland*, 431 U. S., at 499: when the government intrudes on one of the liberties protected by the Due Process Clause of the Fourteenth Amendment, "this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." Because the ordinance challenged in this case significantly limits communicative activity within the Borough, we must scrutinize both the interests advanced by the Borough to justify this limitation on protected expression and the means chosen to further those interests.

As an initial matter, this case is not controlled by *Young* v. *American Mini Theatres, Inc.*, the decision relied upon by the Camden County Court. Although the Court there stated that a zoning ordinance is not invalid merely because it regulates activity protected under the First Amendment, it emphasized that the challenged restriction on the location of adult movie theaters imposed a minimal burden on protected speech. 427 U. S., at 62. The restriction did not affect the number of adult movie theaters that could operate in the city; it merely dispersed them. The Court did not imply that a municipality could ban all adult theaters—much less all live entertainment or all nude dancing—from its commercial districts citywide.[10] Moreover, it was emphasized in that

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[10] JUSTICE STEVENS relied on the District Court's finding that compliance with the challenged ordinances would only impose a slight burden on First Amendment rights, since there were "myriad locations" within the city where new adult movie theaters could be located in compliance with the ordinances. 427 U. S., at 71, n. 35.

Similarly, JUSTICE POWELL's concurring opinion stressed that the effect of the challenged ordinance on First Amendment interests was "incidental and minimal." *Id.*, at 78. He did not suggest that a municipality could validly exclude theaters from its commercial zones if it had included other businesses presenting similar problems. Although he regarded the bur-

case that the evidence presented to the Detroit Common Council indicated that the concentration of adult movie theaters in limited areas led to deterioration of surrounding neighborhoods,[11] and it was concluded that the city had justified the incidental burden on First Amendment interests resulting from merely dispersing, but not excluding, adult theaters.

In this case, however, Mount Ephraim has not adequately justified its substantial restriction of protected activity.[12] None of the justifications asserted in this Court was articulated by the state courts and none of them withstands scrutiny. First, the Borough contends that permitting live entertainment would conflict with its plan to create a commercial area that caters only to the "immediate needs" of its residents and that would enable them to purchase at local stores the few items they occasionally forgot to buy outside the Borough.[13] No evidence was introduced below to support this assertion, and it is difficult to reconcile this characterization of the Borough's commercial zones with the provisions of the ordinance. Section 99–15A expressly states that the purpose of creating commercial zones was to provide areas for "local and *regional* commercial operations." (Emphasis added.) The

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den imposed by the ordinance as minimal, JUSTICE POWELL examined the city's justification for the restriction before he concluded that the ordinance was valid. *Id.*, at 82, and n. 5. Emphasizing that the restriction was tailored to the particular problem identified by the city council, he acknowledged that "[t]he case would have present[ed] a different situation had Detroit brought within the ordinance types of theaters that had not been shown to contribute to the deterioration of surrounding areas." *Id.*, at 82.

[11] *Id.*, at 71, and n. 34 (opinion of STEVENS, J.); *id.*, at 82, n. 5 (POWELL, J., concurring).

[12] If the New Jersey courts had expressly interpreted this ordinance as banning all entertainment, we would reach the same result.

[13] Mount Ephraim's counsel stated in this Court that these stores were available "[i]f you come home at night and you forgot to buy your bread, your milk, your gift." Tr. of Oral Arg. 40.

range of permitted uses goes far beyond providing for the "immediate needs" of the residents. Motels, hardware stores, lumber stores, banks, offices, and car showrooms are permitted in commercial zones. The list of permitted "retail stores" is nonexclusive, and it includes such services as beauty salons, barbershops, cleaners, and restaurants. Virtually the only item or service that may not be sold in a commercial zone is entertainment, or at least live entertainment.[14] The Borough's first justification is patently insufficient.

Second, Mount Ephraim contends that it may selectively exclude commercial live entertainment from the broad range of commercial uses permitted in the Borough for reasons normally associated with zoning in commercial districts, that is, to avoid the problems that may be associated with live entertainment, such as parking, trash, police protection, and medical facilities. The Borough has presented no evidence, and it is not immediately apparent as a matter of experience, that live entertainment poses problems of this nature more significant than those associated with various permitted uses; nor does it appear that the Borough's zoning authority has arrived at a defensible conclusion that unusual problems are presented by live entertainment. Cf. *Young* v. *American Mini Theatres, Inc.*, 427 U. S., at 54–55, and n. 6.[15] We

[14] At present, this effect is somewhat lessened by the presence of at least three establishments that are permitted to offer live entertainment as a nonconforming use. See n. 3, *supra*. These uses apparently may continue indefinitely, since the Mount Ephraim Code does not require nonconforming uses to be terminated within a specified period of time. See Mount Ephraim Code § 99–24 (1979). The Borough's decision to permit live entertainment as a nonconforming use only undermines the Borough's contention that live entertainment poses inherent problems that justify its exclusion.

[15] The Borough also speculates that it may have concluded that live nude dancing is undesirable. Brief for Appellee 20. It is noted that in *California* v. *LaRue*, 409 U. S. 109 (1972), this Court identified a number of problems that California sought to eliminate by prohibiting certain

do not find it self-evident that a theater, for example, would create greater parking problems than would a restaurant.[16] Even less apparent is what unique problems would be posed by exhibiting live nude dancing in connection with the sale of adult books and films, particularly since the bookstore is licensed to exhibit nude dancing on films. It may be that some forms of live entertainment would create problems that are not associated with the commercial uses presently permitted in Mount Ephraim. Yet this ordinance is not narrowly drawn to respond to what might be the distinctive problems arising from certain types of live entertainment, and it is not clear that a more selective approach would fail to address those unique problems if any there are. The Borough has not established that its interests could not be met by restrictions that are less intrusive on protected forms of expression.

The Borough also suggests that § 99–15B is a reasonable "time, place, and manner" restriction; yet it does not identify the municipal interests making it reasonable to exclude all commercial live entertainment but to allow a variety of other

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explicitly sexual entertainment in bars and in nightclubs licensed to serve liquor. This speculation lends no support to the challenged ordinance. First, § 99–15B excludes all live entertainment, not just live nude dancing. Even if Mount Ephraim might validly place restrictions on certain forms of live nude dancing under a narrowly drawn ordinance, this would not justify the exclusion of all live entertainment or, insofar as this record reveals, even the nude dancing involved in this case. Second, the regulation challenged in *California* v. *LaRue* was adopted only after the Department of Alcoholic Beverage Control had determined that significant problems were linked to the activity that was later regulated. Third, in *California* v. *LaRue* the Court relied heavily on the State's power under the Twenty-first Amendment. Cf. *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922 (1975).

[16] Mount Ephraim has responded to the parking problems presented by the uses that are permitted in commercial zones by requiring that each type of commercial establishment provide a specified amount of parking. See Mount Ephraim Code §§ 99–15F (1979).

commercial uses in the Borough.[17] In *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972), we stated:

> "The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest." *Id.*, at 116–117 (footnotes omitted).

Thus, the initial question in determining the validity of the exclusion as a time, place, and manner restriction is whether live entertainment is "basically incompatible with the normal activity [in the commercial zones]." As discussed above, no evidence has been presented to establish that live entertainment is incompatible with the uses presently permitted by the Borough. Mount Ephraim asserts that it could have chosen to eliminate all commercial uses within its boundaries. Yet we must assess the exclusion of live entertainment in light of the commercial uses Mount Ephraim allows, not in light of what the Borough might have done.[18]

To be reasonable, time, place, and manner restrictions not only must serve significant state interests but also must

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[17] Mount Ephraim argued in its brief that nonlive entertainment is an adequate substitute for live entertainment. Brief for Appellee 20–21. This contention was apparently abandoned at oral argument, since the Borough's counsel stated that the ordinance bans all commercial entertainment. At any rate, the argument is an inadequate response to the fact that live entertainment, which the ordinance bans, is protected by the First Amendment.

[18] Thus, our decision today does not establish that every unit of local government entrusted with zoning responsibilities must provide a commercial zone in which live entertainment is permitted.

leave open adequate alternative channels of communication. *Grayned* v. *City of Rockford, supra,* at 116, 118; *Kovacs* v. *Cooper,* 336 U. S. 77, 85–87 (1949); see also *Consolidated Edison Co.* v. *Public Service Comm'n of New York,* 447 U. S. 530, 535 (1980); *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council,* 425 U. S. 748, 771 (1976). Here, the Borough totally excludes all live entertainment, including nonobscene nude dancing that is otherwise protected by the First Amendment. As we have observed, *Young* v. *American Mini Theatres, Inc., supra,* did not purport to approve the total exclusion from the city of theaters showing adult, but not obscene, materials. It was carefully noted in that case that the number of regulated establishments was not limited and that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." 427 U. S., at 71, n. 35.

The Borough nevertheless contends that live entertainment in general and nude dancing in particular are amply available in close-by areas outside the limits of the Borough. Its position suggests the argument that if there were countywide zoning, it would be quite legal to allow live entertainment in only selected areas of the county and to exclude it from primarily residential communities, such as the Borough of Mount Ephraim. This may very well be true, but the Borough cannot avail itself of that argument in this case. There is no countywide zoning in Camden County, and Mount Ephraim is free under state law to impose its own zoning restrictions, within constitutional limits. Furthermore, there is no evidence in this record to support the proposition that the kind of entertainment appellants wish to provide is available in reasonably nearby areas. The courts below made no such findings; and at least in their absence, the ordinance excluding live entertainment from the commercial zone cannot constitutionally be applied to appellants so as to criminalize the activities for which they have been fined. "[O]ne is not to have the exercise of his liberty of expression in appropriate

places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U. S., at 163.

Accordingly, the convictions of these appellants are infirm, and the judgment of the Appellate Division of the Superior Court of New Jersey is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE BLACKMUN, concurring.

I join the Court's opinion, but write separately to address two points that I believe are sources of some ambiguity in this still emerging area of the law.

First, I would emphasize that the presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment. In order for a reviewing court to determine whether a zoning restriction that impinges on free speech is "narrowly drawn [to] further a sufficiently substantial governmental interest," *ante*, at 68, the zoning authority must be prepared to articulate, and support, a reasoned and significant basis for its decision. This burden is by no means insurmountable, but neither should it be viewed as *de minimis*. In this case, Mount Ephraim evidently assumed that because the challenged ordinance was intended as a land-use regulation, it need survive only the minimal scrutiny of a rational relationship test, and that once rationality was established, appellants then carried the burden of proving the regulation invalid on First Amendment grounds. Brief for Appellee 11–12. After today's decision, it should be clear that where protected First Amendment interests are at stake, zoning regulations have no such "talismanic immunity from constitutional challenge." *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 75 (1976) (concurring opinion).

My other observation concerns the suggestion that a local

community should be free to eliminate a particular form of expression so long as that form is available in areas reasonably nearby. In *Mini Theatres* the Court dealt with locational restrictions imposed by a political subdivision, the city of Detroit, that preserved reasonable access to the regulated form of expression within the boundaries of that same subdivision. It would be a substantial step beyond *Mini Theatres* to conclude that a town or county may legislatively prevent its citizens from engaging in or having access to forms of protected expression that are incompatible with its majority's conception of the "decent life" solely because these activities are sufficiently available in other locales. I do not read the Court's opinion to reach, nor would I endorse, that conclusion.*

Were I a resident of Mount Ephraim, I would not expect my right to attend the theater or to purchase a novel to be contingent upon the availability of such opportunities in "nearby" Philadelphia, a community in whose decisions I would have no political voice. Cf. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 556 (1975) ("'[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place,'" quoting *Schneider* v. *State*, 308 U. S. 147, 163 (1939)). Similarly, I would not expect the citizens of Philadelphia to be under any obligation to provide me with access to theaters and bookstores simply because Mount Ephraim previously had acted to ban these forms of "entertainment." This case does not require articulation of a rule for evaluating the meaning of "reasonable access" in different contexts. The scope of relevant zoning authority varies widely across our country, as do geographic configurations and types of commerce among neighboring communities, and this issue

*I need not address here the weight to be given other arguments invoked by local communities as a basis for restricting protected forms of expression.

will doubtless be resolved on a case-by-case basis. For now, it is sufficient to observe that in attempting to accommodate a locality's concern to protect the character of its community life, the Court must remain attentive to the guarantees of the First Amendment, and in particular to the protection they afford to minorities against the "standardization of ideas . . . by . . . dominant political or community groups." *Terminiello* v. *Chicago*, 337 U. S. 1, 4–5 (1949).

JUSTICE POWELL, with whom JUSTICE STEWART joins, concurring.

I join the Court's opinion as I agree that Mount Ephraim has failed altogether to justify its broad restriction of protected expression. This is not to say, however, that some communities are not free—by a more carefully drawn ordinance—to regulate or ban all commercial public entertainment. In my opinion, such an ordinance could be appropriate and valid in a residential community where all commercial activity is excluded. Similarly, a residential community should be able to limit commercial establishments to essential "neighborhood" services permitted in a narrowly zoned area.

But the Borough of Mount Ephraim failed to follow these paths. The ordinance before us was not carefully drawn and, as the Court points out, it is sufficiently overinclusive and underinclusive that any argument about the need to maintain the residential nature of this community fails as a justification.

JUSTICE STEVENS, concurring in the judgment.

The record in this case leaves so many relevant questions unanswered that the outcome, in my judgment, depends on the allocation of the burden of persuasion. If the case is viewed as a simple attempt by a small residential community to exclude the commercial exploitation of nude dancing from a "setting of tranquility," *post*, at 85 (BURGER, C. J., dissenting), it would seem reasonable to require appellants to over-

come the usual presumption that a municipality's zoning enactments are constitutionally valid. To prevail in this case, appellants at least would be required to show that the exclusion was applied selectively, or perhaps that comparable expressive activity is not "amply available in close-by areas outside the limits of the Borough." *Ante*, at 76 (opinion of the Court). On the other hand, if one starts, as the Court does, from the premise that "appellants' claims are rooted in the First Amendment," *ante*, at 66, it would seem reasonable to require the Borough to overcome a presumption of invalidity. The Borough could carry this burden by showing that its ordinances were narrowly drawn and furthered "a sufficiently substantial government interest." *Ante*, at 68 (opinion of the Court) (footnote omitted).

Neither of these characterizations provides me with a satisfactory approach to this case. For appellants' business is located in a commercial zone, and the character of that zone is not unequivocally identified either by the text of the Borough's zoning ordinance or by the evidence in the record. And even though the foliage of the First Amendment may cast protective shadows over some forms of nude dancing,[1] its roots were germinated by more serious concerns that are not necessarily implicated by a content-neutral zoning ordinance banning commercial exploitation of live entertainment. Cf. *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 60–61.

One of the puzzling features of this case is that the character of the prohibition the Borough seeks to enforce is so hard to ascertain. Because the written zoning ordinance purports to ban all commercial uses except those that are specifically listed—and because no form of entertainment is listed—literally it prohibits the commercial exploitation not only of live entertainment, but of motion pictures and inanimate forms

[1] See, *e. g.*, *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 932; *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 557–558; *California* v. *LaRue*, 409 U. S. 109, 118.

as well.[2] But the record indicates that what actually happens in this commercial zone may bear little resemblance to what is described in the text of the zoning ordinance.

The commercial zone in which appellants' adult bookstore is located is situated along the Black Horse Pike, a north-south artery on the eastern fringe of the Borough.[3] The parties seem to agree that this commercial zone is relatively small; presumably, therefore, it contains only a handful of commercial establishments. Among these establishments are Al-Jo's, also known as the Club Al-Jo, My Dad's, and Caprioti's, all of which offer live entertainment.[4] In addition,

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[2] Section 99–15B of the Mount Ephraim Code, quoted *ante*, at 63 (opinion of the Court), lists the land uses permitted in the Borough's commercial zones. No form of entertainment is included in this list. Section 99–4 of the Code provides that "[a]ll uses not expressly permitted in this chapter are prohibited."

[3] At oral argument in this Court, counsel for the appellants asserted that the commercial zone extends for 250 feet on either side of the Black Horse Pike, and that the remainder of the Borough is zoned for residential use. See Tr. of Oral Arg. 5. THE CHIEF JUSTICE, in dissent, apparently relies upon counsel's description of Mount Ephraim's zoning pattern in support of his contention that Mount Ephraim is a quiet, " 'bedroom' community" into which appellants have thrust the disruptive influence of nude dancing. See *post*, at 85. However, counsel's assertion is unsupported by the record in this case, and indeed is inconsistent with the Borough's zoning ordinance. The Zoning Map of the Borough of Mount Ephraim indicates that, rather than containing a single commercial zone, Mount Ephraim in fact contains four commercial zones. Section 99–8 of the Mount Ephraim Code states that the boundaries of the zoning districts created by § 99–7 of the Code "are hereby established as shown on the map entitled 'Zoning Map of the Borough of Mount Ephraim' which accompanies and is hereby made a part of this chapter." The record does not reveal to what extent, if any, the three additional commercial zones have been commercially developed, but it is apparent from the Borough's Code that Mount Ephraim either has accepted or is prepared to accept a greater degree of commercial development than that presently found in the vicinity of appellants' bookstore.

[4] See Munic. Ct. Tr. 21–22, 35–37, 55, 58–59, 67. My Dad's, which is located directly across the street from appellants' bookstore, features a

the zone contains the Mount Ephraim Democratic Club, the Spread Eagle Inn, and Guiseppi's.[5] The record also contains isolated references to establishments known as the Villa Picasso and Millie's.[6] Although not mentioned in the record, Mount Ephraim apparently also supports a commercial motion picture theater.[7]

The record reveals very little about the character of most of these establishments, and it reveals nothing at all about the motion picture theater. The one fact that does appear with clarity from the present record is that, in 1973, appellants were issued an amusement license that authorized them to exhibit adult motion pictures which their patrons viewed in private booths in their adult bookstore. Borough officials apparently regarded this business as lawful under the zoning ordinance and compatible with the immediate neighborhood until July 1976 when appellants repainted their exterior sign and modified their interior exhibition.[8]

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musical combo that plays music from a stage; a vocalist also performs there on occasion. *Id.*, at 25, 35–36. Capriotti's, a dinner club/discotheque, and Al-Jo's also feature live performances by musical groups. *Id.*, at 22, 36, 55, 58–59. The Borough permits live entertainment in these establishments as a prior nonconforming use.

[5] See *id.*, at 19–20. Appellants' counsel, in his examination of the Borough's building inspector at the Municipal Court trial, attempted to establish that some or all of these establishments had been issued amusement licenses by the Borough. The building inspector, whose duties did not include the issuance or supervision of amusement licenses, was unable to answer counsel's questions. See *ibid.*

[6] See *id.*, at 21, 38.

[7] Counsel for both parties informed the Court at oral argument that a motion picture theater is in operation in Mount Ephraim. See Tr. of Oral Arg. 6, 9, 37–39. The theater apparently is located near and to the east of appellants' bookstore. See *id.*, at 9. According to counsel for the Borough, the theater is permitted as a prior nonconforming use. See *id.*, at 37–39; see also *ante*, at 67, n. 6 (opinion of the Court).

[8] The Borough objected to both the exterior and the interior changes. A substantial part of the proceedings in the Municipal Court and the Camden County Court concerned the repainting of the sign, a dispute

Without more information about this commercial enclave on Black Horse Pike, one cannot know whether the change in appellants' business in 1976 introduced cacophony into a tranquil setting or merely a new refrain in a local replica of Place Pigalle. If I were convinced that the former is the correct appraisal of this commercial zone, I would have no hesitation in agreeing with THE CHIEF JUSTICE that even if the live nude dancing is a form of expressive activity protected by the First Amendment, the Borough may prohibit it.[9] But when the record is opaque, as this record is, I believe the Borough must shoulder the burden of demonstrating that appellants' introduction of live entertainment had an identifiable adverse impact on the neighborhood or on the Borough as a whole. It might be appropriate to presume that such an adverse impact would occur if the zoning plan itself were narrowly drawn to create categories of commercial uses that unambiguously differentiated this entertainment from permitted uses. However, this open-ended ordinance affords no basis for any such presumption.

The difficulty in this case is that we are left to speculate as to the Borough's reasons for proceeding against appellants'

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which appellants ultimately won in the state courts. See App. to Juris. Statement 5a–6a.

[9] THE CHIEF JUSTICE states:

"It is clear that, in passing the ordinance challenged here, the citizens of the Borough of Mount Ephraim meant only to preserve the basic character of their community. It is just as clear that, by thrusting their live nude dancing shows on this community, the appellants alter and damage that community over its objections." *Post*, at 86.

The problem with THE CHIEF JUSTICE's analysis, in my judgment, is that "the basic character of [the] community" is not at all clear on the basis of the present record. Although Mount Ephraim apparently is primarily a residential community, it is also a community that in 1973 deemed an adult bookstore that exhibited adult motion pictures, or "peep shows," not inconsistent with its basic character. I simply cannot say with confidence that the addition of a live nude dancer to this commercial zone in 1976 produced a dramatic change in the community's character.

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business, and as to the justification for the distinction the Borough has drawn between live and other forms of entertainment. While a municipality need not persuade a federal court that its zoning decisions are correct as a matter of policy, when First Amendment interests are implicated, it must at least be able to demonstrate that a uniform policy in fact exists and is applied in a content-neutral fashion. Presumably, municipalities may regulate expressive activity—even protected activity—pursuant to narrowly drawn content-neutral standards; however, they may not regulate protected activity when the only standard provided is the unbridled discretion of a municipal official. Compare *Saia* v. *New York*, 334 U. S. 558, with *Kovacs* v. *Cooper*, 336 U. S. 77.[10] Because neither the text of the zoning ordinance nor the evidence in the record indicates that Mount Ephraim applied narrowly drawn content-neutral standards to the appellants' business, for me this case involves a criminal prosecution of appellants simply because one of their employees has engaged in expressive activity that has been assumed, *arguendo*, to be protected by the First Amendment.[11] Ac-

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[10] The open-ended character of the prohibition in the Mount Ephraim Code, see n. 2, *supra*, presents an opportunity for the exercise of just such unbridled discretion. The Borough has, at different stages of this litigation, advanced two different interpretations of that prohibition. According to one, all commercial entertainment is prohibited within the boundaries of Mount Ephraim; according to the other, only commercial live entertainment is prohibited. See *ante*, at 67, n. 6 (opinion of the Court). Appellants have suggested yet a third possible interpretation. They maintain that the prohibition is applied only against live nude dancing.

[11] Like JUSTICE POWELL, *ante*, at 79 (concurring opinion), I have no doubt that some residential communities may, pursuant to a carefully drawn ordinance, regulate or ban commercial public entertainment within their boundaries. Surely, a municipality zoned entirely for residential use need not create a special commercial zone solely to accommodate purveyors of entertainment. Cf. *Valley View Village* v. *Proffett*, 221 F. 2d 412, 417–418 (CA6 1955) (Stewart, J.) (zoning ordinance that provides only

cordingly, and without endorsing the overbreadth analysis employed by the Court, I concur in its judgment.

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting.

The Borough of Mount Ephraim is a small borough in Camden County, N. J. It is located on the Black Horse Turnpike, the main artery connecting Atlantic City with two major cities, Camden and Philadelphia. Mount Ephraim is about 17 miles from the city of Camden and about the same distance from the river that separates New Jersey from the State of Pennsylvania.

The Black Horse Turnpike cuts through the center of Mount Ephraim. For 250 feet on either side of the turnpike, the Borough has established a commercial zone. The rest of the community is zoned for residential use, with either single- or multi-family units permitted. Most of the inhabitants of Mount Ephraim commute to either Camden or Philadelphia for work.

The residents of this small enclave chose to maintain their town as a placid, "bedroom" community of a few thousand people. To that end, they passed an admittedly broad regulation prohibiting certain forms of entertainment. Because I believe that a community of people are—within limits—masters of their own environment, I would hold that, as applied, the ordinance is valid.

At issue here is the right of a small community to ban an activity incompatible with a quiet, residential atmosphere. The Borough of Mount Ephraim did nothing more than employ traditional police power to provide a setting of tranquility. This Court has often upheld the power of a community "to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-

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for residential use is not *per se* invalid). Mount Ephraim, however, is not such a municipality.

balanced as well as carefully patrolled." *Berman* v. *Parker*, 348 U. S. 26, 33 (1954). Justice Douglas, speaking for the Court, sustained the power to zone as

> "ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, 9 (1979).

Here we have nothing more than a variation on that theme.

The Court depicts Mount Ephraim's ordinance as a ban on live entertainment. But, in terms, it does not mention any kind of entertainment. As applied, it operates as a ban on nude dancing in appellants' "adult" bookstore, and for that reason alone it is here. Thus, the issue *in the case that we have before us* is not whether Mount Ephraim may ban traditional live entertainment, but whether it may ban nude dancing, which is used as the "bait" to induce customers into the appellants' bookstore. When, and if, this ordinance is used to prevent a high school performance of "The Sound of Music," for example, the Court can deal with that problem.

An overconcern about draftsmanship and overbreadth should not be allowed to obscure the central question before us. It is clear that, in passing the ordinance challenged here, the citizens of the Borough of Mount Ephraim meant only to preserve the basic character of their community. It is just as clear that, by thrusting their live nude dancing shows on this community, the appellants alter and damage that community over its objections. As applied in this case, therefore, the ordinance speaks directly and unequivocally. It may be that, as applied in some other case, this ordinance would violate the First Amendment, but, since such a case is not before us, we should not decide it.

Even assuming that the "expression" manifested in the nude dancing that is involved here is somehow protected speech under the First Amendment, the Borough of Mount

Ephraim is entitled to regulate it. In *Young* v. *American Mini-Theatres, Inc.*, 427 U. S. 50, 62 (1972), we said:

> "The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances."

Here, as in *American Mini-Theatres*, the zoning ordinance imposes a minimal intrusion on genuine rights of expression; only by contortions of logic can it be made otherwise. Mount Ephraim is a small community on the periphery of two major urban centers where this kind of entertainment may be found acceptable. The fact that nude dancing has been totally banned in this community is irrelevant. "Chilling" this kind of show business in this tiny residential enclave can hardly be thought to show that the appellants' "message" will be prohibited in nearby—and more sophisticated—cities.

The fact that a form of expression enjoys some constitutional protection does not mean that there are not times and places inappropriate for its exercise. The towns and villages of this Nation are not, and should not be, forced into a mold cast by this Court. Citizens should be free to choose to shape their community so that it embodies their conception of the "decent life." This will sometimes mean deciding that certain forms of activity—factories, gas stations, sports stadia, bookstores, and surely live nude shows—will not be allowed. That a community is willing to tolerate such a commercial use as a convenience store, a gas station, a pharmacy, or a delicatessen does not compel it also to tolerate every other "commercial use," including pornography peddlers and live nude shows.

In Federalist Paper No. 51, p. 160 (R. Fairfield ed. 1966), Madison observed:

> "In framing a government which is to be administered by men over men, the great difficulty lies in this: you

> must first enable the government to control the governed; and in the next place oblige it to control itself."

This expresses the balancing indispensable in all governing, and the Bill of Rights is one of the checks to control overreaching by government. But it is a check to be exercised sparingly by federal authority over local expressions of choice going to essentially local concerns.

I am constrained to note that some of the concurring views exhibit an understandable discomfort with the idea of denying this small residential enclave the power to keep this kind of show business from its very doorsteps. The Borough of Mount Ephraim has not attempted to suppress the point of view of anyone or to stifle any category of ideas. To say that there is a First Amendment right to impose every form of expression on every community, including the kind of "expression" involved here, is sheer nonsense. To enshrine such a notion in the Constitution ignores fundamental values that the Constitution ought to protect. To invoke the First Amendment to protect the activity involved in this case trivializes and demeans that great Amendment.

Syllabus

GULF OIL CO. ET AL. *v.* BERNARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80–441. Argued March 30, 1981—Decided June 1, 1981

Petitioner Gulf Oil Co. and the Equal Employment Opportunity Commission entered into a conciliation agreement involving alleged discrimination against black and female employees at one of Gulf's refineries. Under this agreement, Gulf undertook to offer backpay to alleged victims of discrimination and began to send notices to employees eligible for backpay, stating the amount available in return for execution of a full release of all discrimination claims. Respondents then filed a class action in Federal District Court against Gulf and petitioner labor union, on behalf of all black present and former employees and rejected applicants for employment, alleging racial discrimination in employment and seeking injunctive, declaratory, and monetary relief. Gulf then filed a motion seeking an order limiting communications from the named plaintiffs (respondents) and their counsel to class members. Ultimately, over respondents' objections, the District Court issued an order, based on the form of order in the Manual for Complex Litigation, imposing a complete ban on all communications concerning the class action between parties or their counsel and any actual or potential class member who was not a formal party, without the court's prior approval. The order stated that if any party or counsel asserted a constitutional right to communicate without prior restraint and did so communicate, he must file a copy of the communication with the court. The court made no findings of fact and did not write an explanatory opinion. The Court of Appeals reversed, holding that the order limiting communications was an unconstitutional prior restraint on expression accorded First Amendment protection.

Held: The District Court in imposing the order in question abused its discretion under the Federal Rules of Civil Procedure. Pp. 99–104.

(a) The order is inconsistent with the general policies embodied in Federal Rule of Civil Procedure 23, which governs class actions in federal district courts. It interfered with respondents' efforts to inform potential class members of the existence of the lawsuit, and may have been particularly injurious—not only to respondents but to the class as a whole—because employees at that time were being pressed to decide whether to accept Gulf's backpay offers. In addition, the order made

it more difficult for respondents to obtain information about the merits of the case from the persons they sought to represent. Pp. 99–101.

(b) Because of these potential problems, such an order should be based on a clear record and specific findings reflecting a weighing of the need for a limitation and the potential interference with the parties' rights. Only such a determination can ensure that the court is furthering, rather than hindering, the policies embodied in the Federal Rules, especially Rule 23. Moreover, such a weighing should result in a carefully drawn order that limits speech as little as possible, consistent with the parties' rights. Pp. 101–102.

(c) Here, there is no indication of a careful weighing of competing factors, and the record discloses no grounds on which the District Court could have determined that it was necessary or appropriate to impose the order. The fact that the order involved serious restraints on expression, at a minimum, counsels caution on the District Court's part in drafting the order and attention to whether the restraint was justified by a likelihood of serious abuses. Pp. 102–104.

(d) The mere possibility of abuses in class-action litigation does not justify routine adoption of a communications ban that interferes with the formation of a class or the prosecution of a class action in accordance with the Federal Rules. And certainly there was no justification for adopting the form of order recommended by the Manual for Complex Litigation, in the absence of a clear record and specific findings of need. P. 104.

619 F. 2d 459, affirmed.

POWELL, J., delivered the opinion for a unanimous Court.

Wm. G. Duck argued the cause for petitioners. With him on the briefs were *Susan R. Sewell* and *Carl A. Parker.*

Jack Greenberg argued the cause for respondents. With him on the brief were *Bill Lann Lee, Barry L. Goldstein,* and *Ulysses Gene Thibodeaux.*

Deputy Solicitor General Wallace argued the cause for the United States et al. as *amici curiae* urging affirmance. With him on the brief were *Solicitor General McCree, Acting Assistant Attorney General Turner, Harlon L. Dalton, Jessica Dunsay Silver, Carol E. Heckman,* and *Leroy D. Clark.**

**Stuart Rothman* and *George C. Smith* filed a brief for Hudson Pulp and Paper Corp. as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Arthur B. Spitzer*

JUSTICE POWELL delivered the opinion of the Court.

This is a class action involving allegations of racial discrimination in employment on the part of petitioners, the Gulf Oil Co. (Gulf) and one of the unions at its Port Arthur, Tex., refinery. We granted a writ of certiorari to determine the scope of a district court's authority to limit communications from named plaintiffs and their counsel to prospective class members, during the pendency of a class action. We hold that in the circumstances of this case the District Court exceeded its authority under the Federal Rules of Civil Procedure.

I

In April 1976, Gulf and the Equal Employment Opportunity Commission (EEOC) entered into a conciliation agreement involving alleged discrimination against black and female employees at the Port Arthur refinery. Gulf agreed to cease various allegedly discriminatory practices, to undertake an affirmative-action program covering hiring and promotion, and to offer backpay to alleged victims of discrimination based on a set formula. Gulf began to send notices to the 643 employees eligible for backpay, stating the exact amount available to each person in return for execution within 30 days of a full release of all discrimination claims dating from the relevant time period.[1]

Approximately one month after the signing of the conciliа-

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and *Kenneth J. Guido, Jr.*, for the American Civil Liberties Union Fund of the National Capital Area et al.; by *Mayo L. Coiner* and *Harry M. Philo* for the Association of Trial Lawyers of America; by *Richard F. Watt* and *Martha A. Mills* for the Chicago Council of Lawyers; and by *William F. Kaspers* and *John D. Buchanan, Jr.*, for the Tallahassee Memorial Hospital.

[1] The letter stated that "[b]ecause this offer is personal in nature, Gulf asks that you not discuss it with others." It added, however, that those who did not understand the offer could request that a company official arrange an interview with a Government representative. Brief for United States et al. as *Amici Curiae* 1a.

tion agreement, on May 18, 1976, respondents filed this class action in the United States District Court for the Eastern District of Texas, on behalf of all black present and former employees, and rejected applicants for employment, at the refinery.[2] They alleged racial discrimination in employment and sought injunctive, declaratory, and monetary relief, based on Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U. S. C. § 1981. The defendants named were Gulf and Local 4–23 of the Oil, Chemical, and Atomic Workers International Union. Plaintiffs' counsel included three lawyers from the NAACP Legal Defense and Education Fund.[3] Through this lawsuit, the named plaintiffs sought to vindicate the alleged rights of many of the employees who were receiving settlement offers from Gulf under the conciliation agreement.

On May 27, Gulf filed a motion in the District Court seeking an order limiting communications by parties and their counsel with class members. An accompanying brief described the EEOC conciliation agreement, asserting that 452 of the 643 employees entitled to backpay under that agreement had signed releases and been paid by the time the class action was filed. Gulf stated that after it was served in the case, it ceased sending backpay offers and release forms to class members. It then asserted that a lawyer for respond-

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[2] Three of the named plaintiffs, Bernard, Brown, and Johnson, had filed individual charges before the EEOC in 1967. The Commission pursued conciliation efforts based on these charges until February 1975 when these three persons received letters stating that Gulf and the union no longer wished to entertain conciliation discussions. The letters stated that the three could request "right to sue" letters at any time, and would have 90 days from the receipt of such letters to file suit under Title VII. Bernard and Brown received notices of right to sue from the Commission on June 11, 1976.

The conciliation agreement between Gulf and the EEOC was premised on a separate charge filed against Gulf by the Commission itself in 1968.

[3] Two other attorneys also assisted in the representation.

ents, Ulysses Gene Thibodeaux, had attended a meeting of 75 class members on May 22, where he had discussed the case and recommended that the employees not sign the releases sent under the conciliation agreement. Gulf added that Thibodeaux reportedly had advised employees to return checks they already had received, since they could receive at least double the amounts involved through the class action.

The court entered a temporary order prohibiting all communications concerning the case from parties or their counsel to potential or actual class members. The order listed several examples of communications that were covered, but stated that it was not limited to these examples. It was not based on any findings of fact.

On June 8, Gulf moved for a modification of the order that would allow it to continue mailings to class members, soliciting releases in exchange for the backpay amounts established under the conciliation agreement. Respondents filed a brief in opposition, arguing that the ban on their communications with class members violated the First Amendment. On June 11, the court heard oral argument, but took no evidence. Gulf then filed a supplemental memorandum proposing that the court adopt the language of "Sample Pretrial Order No. 15" in the Manual for Complex Litigation App. § 1.41.[4] Respondents replied with another memorandum, accompanied by sworn affidavits of three lawyers. In these affidavits counsel stated that communications with class mem-

[4] The Manual, containing an important compilation of suggested procedures for handling complex federal cases, was published under the supervision of a distinguished group of federal judges. It is printed in full in Part 2 of 1 J. Moore, J. Lucas, H. Fink, D. Weckstein, & J. Wicker, Moore's Federal Practice (1980).

In its proposed order, Gulf added language allowing it to continue paying backpay and obtaining releases under the conciliation agreement. It suggested that the Clerk of the Court should send a notice to class members informing them that they had 45 days in which to decide to accept the Gulf offer.

bers were important in order to obtain needed information about the case and to inform the class members of their rights. Two affidavits stated that lawyers had attended the May 22 meeting with employees and discussed the issues in the case but neither advised against accepting the Gulf offer nor represented that the suit would produce twice the amount of backpay available through the conciliation agreement.

On June 22, another District Judge issued a modified order adopting Gulf's proposal.[5] This order imposed a complete

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[5] The June 22 order stated, in part:

"In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addresses by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F. R. Civ. P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

"This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of public office or agency (such as the Attorney General) which do not have the effect of soliciting represen-

ban on all communications concerning the class action between parties or their counsel and any actual or potential class member who was not a formal party, without the prior approval of the court. It gave examples of forbidden communications, including any solicitation of legal representation of potential or actual class members, and any statements "which may tend to misrepresent the status, purposes and effects of the class action" or "create impressions tending without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice." The order exempted attorney-client communications initiated by the client, and communications in the regular course of business. It further stated that if any party or counsel "assert[ed] a constitutional right to communicate . . . without prior restraint," and did so communicate, he should file with the court a copy or summary of the communication within five days. The order, finally, exempted communications from Gulf involving the conciliation agreement and its settlement process.

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tation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

"If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral."

This section of the order was drawn word-for-word from the Manual for Complex Litigation App. § 1.41. The order then went on to authorize Gulf to continue with the settlement process under the terms of the conciliation agreement, and to direct the Clerk of Court to send the notice described in n. 4, *supra*. A paragraph near the end of the order then reiterated the proscription on communications:

"(8) [It is ordered that] any further communication, either direct or indirect, oral or in writing (other than those permitted pursuant to paragraph (2) above) from the named parties, their representatives or counsel to the potential or actual class members not formal parties to this action is forbidden."

The court made no findings of fact and did not write an explanatory opinion. The only justification offered was a statement in the final paragraph of the order:

> "It is Plaintiff's [*sic*] contention that any such provisions as hereinbefore stated that limit communication with potential class members are constitutionally invalid, citing *Rodgers* v. *United States Steel Corporation*, 508 F. 2d 152 (3rd Cir. 1975), *cert. denied*, 420 U. S. 969 (1975). This Court finds that the *Rodgers* case is inapplicable, and that this order comports with the requisites set out in the *Manual for Complex Litigation* . . . which specifically exempts constitutionally protected communication when the substance of such communication is filed with the Court."

On July 6, pursuant to the court's order respondents submitted for court approval a proposed leaflet to be sent to the class members.[6] This notice urged the class to talk to a law-

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[6] The proposed notice stated:

"ATTENTION BLACK WORKERS OF GULF OIL

"The Company has asked you to sign a release. If you do, you may be giving up very important civil rights. It is important that you fully understand what you are getting in return for the release. *IT IS IMPORTANT THAT YOU TALK TO A LAWYER BEFORE YOU SIGN.* These lawyers will talk to you *FOR FREE:* [names and addresses of respondents' counsel].

"These lawyers represent six of your fellow workers in a lawsuit titled *Bernard* v. *Gulf Oil Co.*, which was filed in Beaumont Federal Court on behalf of all of you. This suit seeks to correct fully the alleged discriminatory practices of Gulf.

"Even if you have already signed the release, talk to a lawyer. You may consult another attorney. If necessary, have him contact the above-named lawyers for more details. All discussions will be kept strictly confidential.

"AGAIN, IT IS IMPORTANT THAT YOU TALK TO A LAWYER. Whatever your decision might be, we will continue to vigorously prosecute this lawsuit in order to correct all the alleged discriminatory practices at Gulf Oil."

yer before signing the releases sent by Gulf. It contained the names and addresses of respondents' counsel and referred to this case. Respondents argued that the notice was constitutionally protected and necessary to the conduct of the lawsuit. Gulf opposed the motion. The court waited until August 10 to rule on this motion. On that date, 2 days after the expiration of the 45-day deadline established by the court for acceptance of the Gulf offer by class members,[7] the court denied the motion in a one-sentence order containing no explanation. As a result, the named plaintiffs and their counsel were prevented from undertaking any communication with the class members prior to the deadline.

On appeal from a subsequent final order,[8] respondents argued that the limitations on communications imposed by the District Court were beyond the power granted the court in Federal Rule of Civil Procedure 23 (d) and were unconstitutional under the First Amendment. A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed the District Court. 596 F. 2d 1249 (1979).

The panel majority reasoned that orders limiting communications are within the extensive powers of district courts in managing class litigation. It held that the District Court could easily have concluded that the need to limit communications outweighed any competing interests of respondents, especially since the order merely required prior approval of communications, rather than prohibiting them altogether.

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[7] This order had effected a substantial change in the procedure mandated by the conciliation agreement, which provided that "failure on the part of any member to respond within thirty days shall be interpreted as *acceptance* of back pay" (emphasis added). App. 59.

[8] On January 11, 1977, the District Court granted summary judgment to petitioners, dismissing the complaint as untimely. On appeal, respondents argued that their claims had been presented in timely fashion. Both the Fifth Circuit panel, 596 F. 2d 1249, 1254–1258 (1979), and the en banc court, 619 F. 2d 459, 463 (1980), held for respondents on this issue and therefore ordered a remand for further proceedings.

Id., at 1259–1261. Turning to respondents' First Amendment argument, the majority held that the order was not a prior restraint because it exempted unapproved communications whenever the parties or their counsel asserted a constitutional privilege in good faith. The court also found no serious "chill" of protected speech. *Id.*, at 1261–1262.

Judge Godbold wrote a dissenting opinion arguing that the order limiting communications was not "appropriate" within the meaning of Federal Rule of Civil Procedure 23 (d) because the court did not make any finding of actual or imminent abuse. He reasoned that Gulf's unsworn allegations of misconduct could not justify this order, and that a court could not impose such a limitation routinely in all class actions. *Id.*, at 1267–1268. He added that it was improper in this context for the District Court to encourage compliance with the conciliation agreement through such an order. *Id.*, at 1269–1270. Judge Godbold also found that the order violated respondents' First Amendment rights. *Id.*, at 1270–1275.

The Fifth Circuit granted a rehearing en banc, and reversed the panel decision concerning the order limiting communications. 619 F. 2d 459 (1980). A majority opinion joined by 13 judges held that the order was an unconstitutional prior restraint on expression accorded First Amendment protection.[9] The court held that there was no sufficient particularized showing of need to justify such a restraint, that the restraint was overbroad, and that it was not accompanied by the requisite procedural safeguards. *Id.*, at 466–478. Eight

[9] In holding that the order restricted protected speech, the court relied both on cases involving essentially political litigation, *NAACP* v. *Button*, 371 U. S. 415 (1963); *In re Primus*, 436 U. S. 412 (1978), and on cases that may be closer to the present case, involving collective efforts to gain economic benefits accorded a specific group of persons under federal law, *United Transportation Union* v. *Michigan Bar*, 401 U. S. 576 (1971); *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217 (1967); *Railroad Trainmen* v. *Virginia State Bar*, 377 U. S. 1 (1964).

judges concurred specially on the theory that it was unnecessary to reach constitutional issues because the order was not based on adequate findings and therefore was not "appropriate" under Federal Rule of Civil Procedure 23 (d). *Id.*, at 478, 481. One judge would have affirmed the District Court.

We granted a writ of certiorari to review the question whether the order limiting communications was constitutionally permissible. 449 U. S. 1033 (1980).

II

Rule 23 (d) of the Federal Rules of Civil Procedure provides: "(d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (3) imposing conditions on the representative parties or on intervenors . . . [and] (5) dealing with similar procedural matters." [10] As the concurring judges below recognized, 619 F. 2d, at 478, 481, prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision. See *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). As a result, in this case we first consider the authority of district courts under the Federal Rules to impose sweeping limitations on communications by named plaintiffs and their counsel to prospective class members.

More specifically, the question for decision is whether the limiting order entered in this case is consistent with the general policies embodied in Rule 23, which governs class actions in federal court. Class actions serve an important function in our system of civil justice.[11] They present, how-

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[10] Rule 83 provides a more general authorization to district courts, stating that in "all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

[11] Respondents in this case were performing the customary role of named plaintiffs, who seek to "vindicat[e] the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in

ever, opportunities for abuse as well as problems for courts and counsel in the management of cases.[12] Because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties. But this discretion is not unlimited, and indeed is bounded by the relevant provisions of the Federal Rules. *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156 (1974). Moreover, petitioners concede, as they must, that

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which the optimum result might be more than consumed by the cost." *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U. S. 326, 338 (1980). Rule 23 expresses "a policy in favor of having litigation in which common interests, or common questions of law or fact prevail, disposed of where feasible in a single lawsuit." *Rodgers* v. *United States Steel Corp.*, 508 F. 2d 152, 163 (CA3), cert. denied, 423 U. S. 832 (1975).

Although traditional concerns about "stirring up" litigation remain relevant in the class-action context, see n. 12, *infra*, such concerns were particularly misplaced here. Respondents were represented by lawyers from the NAACP Legal Defense and Education Fund—a nonprofit organization dedicated to the vindication of the legal rights of blacks and other citizens. See *In re Primus*, *supra*, at 422, 426–431 (disfinguishing, with respect to First Amendment protections, between solicitation of clients intended to advance political objectives and solicitation of clients for pecuniary gain).

[12] The class-action problems that have emerged since Rule 23 took its present form in 1966 have provoked a considerable amount of comment and discussion. See, *e. g.*, Manual for Complex Litigation; Developments in the Law: Class Actions, 89 Harv. L. Rev. 1318 (1976); Miller, Problems of Administering Judicial Relief in Class Actions under Federal Rule 23 (b)(3), 54 F. R. D. 501 (1972).

The potential abuses associated with communications to class members are described in *Waldo* v. *Lakeshore Estates, Inc.*, 433 F. Supp. 782 (ED La. 1977). That court referred, *inter alia*, to the "heightened susceptibilities of nonparty class members to solicitation amounting to barratry as well as the increased opportunities of the parties or counsel to 'drum up' participation in the proceeding." *Id.*, at 790. The court added that "[u]napproved communications to class members that misrepresent the status or effect of the pending action also have an obvious potential for confusion and/or adversely affecting the administration of justice." *Id.*, at 790–791. See also Manual for Complex Litigation App. § 1.41.

exercises of this discretion are subject to appellate review. Brief for Petitioners 21, n. 15; see *Eisen, supra; Oppenheimer Fund, Inc.* v. *Sanders*, 437 U. S. 340, 359 (1978).

In the present case, we are faced with the unquestionable assertion by respondents that the order created at least potential difficulties for them as they sought to vindicate the legal rights of a class of employees.[13] The order interfered with their efforts to inform potential class members of the existence of this lawsuit, and may have been particularly injurious—not only to respondents but to the class as a whole—because the employees at that time were being pressed to decide whether to accept a backpay offer from Gulf that required them to sign a full release of all liability for discriminatory acts.[14] In addition, the order made it more difficult for respondents, as the class representatives, to obtain information about the merits of the case from the persons they sought to represent.

Because of these potential problems, an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.[15] Only such

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[13] See generally Comment, Judicial Screening of Class Action Communications, 55 N. Y. U. L. Rev. 671, 699–704 (1980); Note, 88 Harv. L. Rev. 1911, 1917–1920 (1975).

[14] In Title VII, Congress expressed a preference for voluntary settlements of disputes through the conciliation process. *E. g., Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974). But, as the en banc majority stated, it is not appropriate to promote such a policy by restricting information relevant to the employee's choice:

"The choice between the lawsuit and accepting Gulf's back pay offer and giving a general release was for each black employee to make. The court could not make it for him, nor should it have freighted his choice with an across-the-board ban that restricted his access to information and advice concerning the choice." 619 F. 2d, at 477.

[15] As noted *infra*, we do not reach the question of what requirements the First Amendment may impose in this context. Full consideration of

a determination can ensure that the court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially Rule 23.[16] In addition, such a weighing—identifying the potential abuses being addressed—should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances. As the court stated in *Coles* v. *Marsh*, 560 F. 2d 186, 189 (CA3), cert. denied, 434 U. S. 985 (1977):

> "[T]o the extent that the district court is empowered . . . to restrict certain communications in order to prevent frustration of the policies of Rule 23, it may not exercise the power without a specific record showing by the moving party of the particular abuses by which it is threatened. Moreover, the district court must find that the showing provides a satisfactory basis for relief and that the relief sought would be consistent with the policies of Rule 23 giving explicit consideration to the narrowest possible relief which would protect the respective parties."

III

In the present case, one looks in vain for any indication of a careful weighing of competing factors. Indeed, in this respect, the District Court failed to provide any record useful for appellate review. The court made neither factual findings nor legal arguments supporting the need for this sweeping restraint order. Instead, the court adopted *in toto* the order suggested by the Manual for Complex Litigation—on

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the constitutional issue should await a case with a fully developed record concerning possible abuses of the class-action device.

[16] Cf. *In re Halkin*, 194 U. S. App. D. C. 257, 274, 598 F. 2d 176, 193 (1979) ("To establish 'good cause' for a protective order under [Federal Rule of Civil Procedure] 26 (c), '[t]he courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements' ") (quoting 8 C. Wright & A. Miller, Federal Practice and Procedure § 2035, p. 265 (1970)).

the apparent assumption that no particularized weighing of the circumstances of the case was necessary.

The result was an order requiring prior judicial approval of all communications, with the exception of cases where respondents chose to assert a constitutional right. Even then, respondents were required to preserve all communications for submission to the court within five days.[17] The scope of this order is perhaps best illustrated by the fact that the court refused to permit mailing of the one notice respondents submitted for approval. See *supra*, at 96–97. This notice was intended to encourage employees to rely on the class action for relief, rather than accepting Gulf's offer. The court identified nothing in this notice that it thought was improper and indeed gave no reasons for its negative ruling.

We conclude that the imposition of the order was an abuse of discretion. The record reveals no grounds on which the District Court could have determined that it was necessary or appropriate to impose this order.[18] Although we do not

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[17] The order contains a serious ambiguity concerning the response that the court could make if it found no merit in respondents' assertion of a constitutional right with respect to a particular communication. Arguably, this "constitutional" exception was not a realistic option for respondents because they could be exposed to the risk of a contempt citation if the court determined that a communication submitted after-the-fact was not constitutionally protected. See 619 F. 2d, at 471 (referring to "the omissions and ambiguities of the order and possible differing constructions as to when, if at all, one is protected against contempt"). At the very least, parties or their counsel would be required to defend their good faith, at the risk of a contempt citation. Because of this fact, and the practical difficulties of the filing requirement, see *id.*, at 470–471, this exception for constitutionally protected speech did little to narrow the scope of the limitation on speech imposed by the court.

[18] We agree with the Court of Appeals' refusal to give weight to Gulf's unsworn allegations of misconduct on the part of respondents' attorneys: "We can assume that the district court did not ground its order on a conclusion that the charges of misconduct made by Gulf were true. Nothing in its order indicates that it did, and, if it did, such a conclusion would

decide what standards are mandated by the First Amendment in this kind of case, we do observe that the order involved serious restraints on expression. This fact, at minimum, counsels caution on the part of a district court in drafting such an order, and attention to whether the restraint is justified by a likelihood of serious abuses.

We recognize the possibility of abuses in class-action litigation, and agree with petitioners that such abuses may implicate communications with potential class members.[19] But the mere possibility of abuses does not justify routine adoption of a communications ban that interferes with the formation of a class or the prosecution of a class action in accordance with the Rules. There certainly is no justification for adopting verbatim the form of order recommended by the Manual for Complex Litigation, in the absence of a clear record and specific findings of need. Other, less burdensome remedies may be appropriate.[20] Indeed, in many cases there will be no problem requiring remedies at all.

In the present case, for the reasons stated above, we hold that the District Court abused its discretion.[21] Accordingly, the judgment below is affirmed.

It is so ordered.

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have been procedurally improper and without evidentiary support. Rather the court appears to have acted upon the rationale of the *Manual* that the court has the power to enter a ban on communications in any actual or potential class action as a prophylactic measure against potential abuses envisioned by the *Manual*." *Id.*, at 466 (footnote omitted).

[19] See n. 12, *supra*.

[20] For example, an order requiring parties to file copies of nonprivileged communications to class members with the court may be appropriate in some circumstances.

[21] In the conduct of a case, a court often finds it necessary to restrict the free expression of participants, including counsel, witnesses, and jurors. Our decision regarding the need for careful analysis of the particular circumstances is limited to the situation before us—involving a broad restraint on communication with class members. We also note that the rules of ethics properly impose restraints on some forms of expression. See, *e. g.*, ABA Code of Professional Responsibility, DR 7–104 (1980).

Syllabus

MINNICK ET AL. *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 79–1213. Argued December 2, 1980—Decided June 1, 1981

Petitioners, two white male correctional officers employed by the California Department of Corrections and an organization representing correctional officers and some other Department employees, filed suit in California state court against respondents, the Department and various state officers, alleging that the Department's affirmative-action plan unlawfully discriminated against white males and that the individual petitioners had been denied promotions because of race. On the basis of the California Supreme Court's decision in *Bakke* v. *University of California Regents*, 18 Cal. 3d 34, 553 P. 2d 1152, the trial court enjoined respondents from giving any preference on the basis of race or sex in hiring or promoting any employee, but allowed the use of race or sex as a factor in making job assignments. On respondents' appeal, the California Court of Appeal reversed, holding that the trial court's rationale was no longer tenable in view of this Court's intervening decision in *University of California Regents* v. *Bakke*, 438 U. S. 265. However, the Court of Appeal did not unequivocally direct that judgment be entered for respondents, but left certain questions open for "examination if the case is to be retried."

Held: This Court's writ of certiorari, granted to review the merits of the Court of Appeal's decision, is dismissed. Because of significant developments in the law and because of significant ambiguities in the record concerning both the extent to which race or sex has been used as a factor in making promotions and the justification for such use, the constitutional issues should not be addressed until the trial court's proceedings are finally concluded and the state appellate courts have completed their review of the trial court record. Pp. 120–127.

Certiorari dismissed. Reported below: 95 Cal. App. 3d 506, 157 Cal. Rptr. 260.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. REHNQUIST, J., filed a concurring opinion, *post*, p. 127. BRENNAN, J., filed an opinion concurring in the judgment, *post*, p. 127. STEWART, J., filed a dissenting opinion, *post*, p. 128.

Ronald Yank argued the cause for petitioners. With him on the briefs was *Gary M. Messing.*

Stuart R. Pollak argued the cause for respondents. With him on the brief was *Steven Lee Mayer.**

JUSTICE STEVENS delivered the opinion of the Court.

Petitioners contend that an affirmative-action plan adopted by the California Department of Corrections in 1974 is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The trial court agreed and entered judgment in petitioners' favor. The California Court of Appeal reversed, 95 Cal. App. 3d 506, 157 Cal. Rptr. 260, holding that the trial court's rationale was no longer tenable in light of this Court's intervening decision in *University of California Regents* v. *Bakke,* 438 U. S. 265. The Court of Appeal's

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*Briefs of *amici curiae* urging reversal were filed by *Robert A. Helman, Douglas A. Poe, Meyer Eisenberg, Justin J. Finger, Jeffrey P. Sinensky,* and *Richard A. Weisz* for the Anti-Defamation League of B'Nai B'Rith; and by *Robert E. Williams, Douglas S. McDowell,* and *Daniel R. Levinson* for the Equal Employment Advisory Council.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General McCree, Assistant Attorney General Days, Deputy Solicitor General Wallace, Edwin S. Kneedler, Brian K. Landsberg, Jessica Dunsay Silver, Leroy D. Clark, Lutz Alexander Prager,* and *Paul E. Mirengoff* for the United States et al.; by *Robert Abrams,* Attorney General of New York, *Shirley Adelson Siegel,* Solicitor General, *Robert Hermann* and *Peter Bienstock,* Assistant Attorneys General, and *Daniel Berger,* Deputy Assistant Attorney General, for the New York State Department of Correctional Services; by *Charles Stephen Ralston, Jack Greenberg, Eric Schnapper, O. Peter Sherwood,* and *Barry L. Goldstein* for the City of Detroit; by *E. Richard Larson, Isabelle Katz Pinzler,* and *Bruce J. Ennis* for the American Civil Liberties Union et al.; and by *Mark N. Aaronson* and *Thomas A. Seaton* for the California Department of Fair Employment and Housing et al.

Briefs of *amici curiae* were filed by *J. Albert Woll, Laurence Gold, Michael H. Gottesman,* and *Robert M. Weinberg* for the American Federation of Labor and Congress of Industrial Organizations; and by *Ronald A. Zumbrun* and *John H. Findley* for the Pacific Legal Foundation.

opinion, however, also identified certain problems that "require examination if the case is to be retried." Thus although we granted certiorari to review the merits of the Court of Appeal's decision, 448 U. S. 910, we first must confront the question whether the writ should be dismissed because the judgment did not finally determine the legal status of the challenged plan.

I

The 1974 "Affirmative Action Program," as revised in 1975, is a lengthy and somewhat ambiguous document. Much of the plan relates to the Department's commitment to the eradication of discrimination on the basis of race and sex. The plan's first section, which describes the program in general terms, states:

> "It is the policy of the Department of Corrections to provide equal employment opportunities for all persons on the basis of merit and fitness and to prohibit discrimination based on race, sex, color, religion, national origin, or ancestry in every aspect of personnel policy and practices in the employment, career development, advancement and treatment of employees." [1]

This section of the plan then identifies specific means of implementing this general nondiscriminatory policy.[2] The second section of the plan, which establishes guidelines for the implementation of the program within the existing organizational structure and defines the affirmative-action roles

[1] App. 3.

[2] "Specific actions required by [the] plan" include, *inter alia*, increasing the number of female and minority employees through "programs for recruiting, selecting, hiring, and promoting minorities and women," monitoring employment practices related to employment of women and minorities, establishing goals for measuring success in complying with nondiscrimination laws, training staff to "develop a sensitivity . . . to recognize and positively deal with discriminatory practices," and training women and minority employees to assure their full participation at all employment levels. *Id.*, at 3–4.

of Department employees, also contains a number of provisions suggesting that the plan was intended to remove any barriers to equal employment opportunities.[3] Finally, the third section, which identifies specific objectives of the plan, also refers to departmental efforts to eliminate discrimination in hiring and in employment practices.[4]

The plan does, however, contain some indication that the Department intended to go beyond the eradication of discriminatory practices. The second section states that deputy

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[3] The plan, for example, provides for the creation of various new positions, including a supervisor for the human relations section:

"The Supervisor, Human Relations Section, under the direct supervision of the Assistant Director, Personnel Management, and Training Division, shall have authority and responsibility for the following duties:

. . . . . .

"7. Provide assistance to the Departmental Training Officer and local Training Officers in developing training relative to human relations and affirmative action.

"8. Review the department's programs and procedures related to personnel activities and make recommendations for any changes necessary to remove barriers to attainment of equal employment opportunity.

"9. Develop procedures with the Assistant Director, Womens Affairs for the receipt and the investigation of allegations and complaints by individuals, organizations, employees, or other third parties of discrimination on grounds of race, color, sex or national origin." *Id.*, at 8–10.

Each division, institution, and parole region was to appoint an Affirmative Action Representative, whose duties include acting as liaison between "management and program staff, various organization units, special interest groups and organizations, [and] community leaders," analyzing discrimination complaints to identify problem areas and assist in their resolution, and assisting in the development of a written recruitment plan. *Id.*, at 11.

[4] The plan has as some of its objectives recruitment programs designed to reach minority communities and schools with significant minority enrollments, *id.*, at 20–21, continuous review of job requirements to insure that qualification standards "are based upon the minimum required to perform necessary duties," *id.*, at 23, on-the-job training to prepare employees to meet the requirements of their jobs, *id.*, at 25, and the communication to managers, supervisors, and employees of the commitment of the Department to equal employment opportunity. *Id.*, at 27.

directors, assistant directors, and division chiefs were to be responsible for developing a plan to "correct identifiable . . . deficiencies through specific, measurable, attainable hiring and promotional goals with target dates in each area of underutilization." [5] The plan also refers to "guidelines" issued by the Law Enforcement Assistance Administration of the United States Department of Justice (LEAA) indicating "that an Agency's percentage of minority personnel should be at least 70% of that minority in its service (inmate population)." [6] Moreover, the plan notes that in "the total labor force in California, 38.1% are female; Department of Corrections' personnel reflect a total of only 17.3%." [7] The section of the plan containing objectives indicates a commitment by the Department to "[i]ncrease departmental efforts to employ minorities and women to achieve the percentages . . . per LEAA guidelines within five (5) years," and to achieve a work force containing 36% minorities and 38% women.[8] The plan does not identify what means, in addition to eradicating discriminatory practices, the Department would employ to achieve these percentages. Thus, the plan may be interpreted as predicting that a nondiscriminatory policy would result in a work force including 36% minority and 38% female employees by 1979; alternatively, it may be read as

[5] *Id.*, at 6.

[6] *Id.*, at 28. The plan then continues:

"On this basis, Black personnel should represent at least 22.5% of the departmental work force, whereas they apparently comprise 8.8%. Similarly, Spanish surname personnel should represent 12.1%, but actually comprise 7.4%. Native American personnel should comprise .7%, while they actually make up .2%. Only the Asian and other extraction are represented in accord with the guidelines." *Id.*, at 28–29.

[7] *Id.*, at 31.

[8] *Id.*, at 16–17. The plan contains detailed statistics relating to the number of employees of different groups referred to as "Black," "Asian," "Spanish surnamed," "native American," and "other extraction," as well as breakdowns by sex, in different positions and in the various facilities operated by the Department of Corrections. *Id.*, at 28–65.

mandating affirmative action to achieve these percentages by the target date.[9]

II

In December 1975 the three petitioners commenced this litigation in a California Superior Court. Minnick and Darden, the individual petitioners, are white male correctional officers. The third petitioner, the California Correction Officers Association (CCOA), is an employee organization that represents correctional officers and some other employees of the Department. In their complaint petitioners alleged that the affirmative-action plan unlawfully discriminated against white males and that the individual petitioners had been denied promotions because they were white.

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[9] For example, one of the stated objectives of the plan is "to increase significantly the utilization of minorities and women across organizational units of the CDC and at all levels possible as vacancies occur." The first "specific action" listed to accomplish this objective relates to the elimination of discrimination by committing the department to

"[d]evelop recruitment plans and public relations activities with specific focus on minority communities, organizations, and women organizations, to inform them of career opportunities within CDC and the desire to employ minorities and women."

The second "specific action" is to "increase departmental efforts to employ minorities and women" to achieve the LEAA percentages and the 36% minority and 38% female percentages. *Id.*, at 16. No specific means of achieving this goal are indicated. The plan's use of the LEAA guidelines does not clarify the intended implementation of the plan. In discussing the LEAA guidelines, the plan states:

"To provide agencies goals, equal employment opportunity guidelines have been issued by the U. S. Department of Justice. They specify that the percentage of minority staff in the employment of the agency be at least 70% of the percentage of the minorities in the service (inmate) population." *Id.*, at 38 (footnote omitted).

The LEAA guidelines' explanation of their purpose states, in part, that the experience of the LEAA "has demonstrated that the full and equal participation of women and minority individuals in employment opportunities in the criminal justice system is a necessary component to the Safe Streets Act's program to reduce crime and delinquency in the United States." *Id.*, at 71. See 28 CFR § 42.301 (1980).

The California Department of Corrections and various state officers named as defendants, respondents here, denied in the trial court that they had discriminated in hiring and promotion and claimed that the Department's central policy was to hire and promote only the most qualified persons.[10] Alternatively, however, the respondents contended that the State's interest in the efficient and safe operation of the corrections system justifies an attempt to obtain a work force containing a proportion of minority employees amounting to at least 70% of any minority's proportional representation in the inmate population, and also containing as large a percentage of female employees as are found in the total California work force.[11] During pretrial discovery, respondents also indicated that the impact of their past practices had resulted in a disproportionate hiring and promotion of white males, but stated "for the purposes of this litigation" that

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[10] See Tr. 194, 203–206, 383, 452–453, 487–488, 548, 563–564, 591, 666, 668, 672, 773, 792, 882. George C. Jackson, then the Deputy Director of the Department, testified that the program's goal was "to make the Department of Corrections a fair place to work." *Id.*, at 665.

[11] The Deputy Attorney General defending the case on behalf of the respondents stated at trial:

"Our defense is on two levels, your honor.

"First of all, we're contending in this case that the Department only hires the most qualified people, and that's their policy. There may be exceptions down below, but that's their policy.

"On the other hand, if the Court so should find that they're using race as a factor in the hiring process as a qualification process, then we have the burden of showing that they must demonstrate a real reason for doing this. And that's what we've been trying to do with these witnesses, showing they have a real problem.

. . . . . .

"I have a compelling state interest if the Court should find that race is being used as a factor. To do that, I have to show that they have a real problem that they're trying to solve, the violence in the prisons, the operation of the prisons.

"And the next step is to show that they're trying to solve it by hiring minorities in the ratios they're trying to hire." *Id.*, at 660–661.

they did not allege that the Department had engaged in any past intentional discrimination against minority or female workers.[12]

After a trial at which over 30 witnesses testified, the case was argued at length and submitted to the trial judge for decision on November 23, 1976. At that time the Supreme Court of California had only recently held in *Bakke* v. *University of California Regents*, 18 Cal. 3d 34, 553 P. 2d 1152 (1976), that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibited a state university from giving any consideration to an applicant's race in making admissions decisions.

On January 5, 1977, the trial judge issued a "notice of intended decision" which tersely summarized the parties' respective positions:

> "The testimony and documentary evidence herein show, and defendants admit, that defendants have carried on a campaign to, and they do now, select applicants for employment and for promotion based on their sex and on their racial background or ancestry.
>
> "Defendants seek to justify their actions on the basis that while the sex of an applicant is *one* of the factors considered, the applicant must be otherwise qualified for the duties to be performed. Sex or racial background is not the *sole* factor considered. Plaintiffs on the other hand assert that the hiring or promotion of a person based in whole or in part on sex or racial background or ancestry is unconstitutional and void.
>
> "The Court agrees with plaintiffs." App. to Pet. for Cert. D–1—D–2.

The notice then directed that an injunction issue enjoining the respondents "from considering as a factor for employment or for the promotion of a candidate his sex, race or na-

[12] Clerk's Transcript on Appeal 121–122.

tional origin." *Id.*, at D–2. The court directed counsel to prepare an appropriate order and to submit proposed findings of fact and conclusions of law.

Before any further order was entered, respondents filed a motion to reopen the record and to receive detailed evidence of past discriminatory practices.[13] Presumably the proffered evidence would provide support for a defense based on the theory that the plan was justified as a remedy for past discrimination. The evidence was, however, quite plainly irrelevant to the theory of the trial judge's intended decision which was, of course, wholly consistent with the rationale of the California Supreme Court's opinion in *Bakke, supra.* The trial judge summarily denied the motion to reopen.

On October 11, 1977, the trial court entered findings of fact and conclusions of law, a declaratory judgment, and a permanent injunction. *Id.*, at F–1, G–1. The court did not find that either of the individual petitioners had been denied a promotion on the basis of his race or sex. Nor did the court find that the CCOA had standing to bring the action. Two of the findings that the court did enter (No. 8 relating to hiring and promotions and No. 19 relating to job assignments) are especially relevant to the procedural issue before us.

Finding No. 8 provides, in part:

> "Defendants Department of Corrections and Jeri J. Enomoto have discriminated and are continuing to discriminate by reason of sex and by reason of ethnic background in hiring and promotion of employees in the Department.
>
> . . . . .
>
> "In so doing, preferences result in favor of certain ethnic groups, or in favor of one sex to the detriment of the other, and not solely on the qualifications of the individuals involved, or their merits." *Id.*, at F–4.

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[13] Tr. 670–671.

Finding No. 19 provides:

> "The unique and sensitive nature of the functions of the Department of Corrections and the peculiar difficulties inherent in the administration of California's prison system require the Department to exercise broad discretion in making job assignments and in determining the employment responsibilities of its employees. Because of the conditions and circumstances within California prisons and throughout the Department of Corrections, in making job assignments and in determining employment responsibilities it is necessary for the Department to consider, among other factors, the composition of the existing work force and of the inmate population, and the race and sex of employees, in order to serve the compelling state interest in promoting the safety of correctional officers and inmates, encouraging inmate rehabilitation, minimizing racial tensions, and furthering orderly and efficient prison management." *Id.*, at F–6—F–7.

In the conclusions of law and in the permanent injunction, the trial court distinguished hiring and promotion decisions, on the one hand, from job assignments and determination of employment responsibilities, on the other. Finding No. 19 relates only to the latter and provides the basis for the trial court's conclusion that respondents could lawfully consider race and sex as factors in determining job assignments and job responsibilities.[14] That finding also explains the proviso in the permanent injunction allowing the use of race or sex as a factor in making job assignments.[15] Finding No. 8,

[14] Conclusion of Law No. 4 reads as follows:

"It is not contrary to law for the Department, in determining job assignments and job responsibilities of its employees, to consider, among other relevant factors, the composition by race and sex of the existing work force and of the inmate population, and the race and sex of the employees in question." App. to Pet. for Cert. F–8.

[15] The permanent injunction contains the following proviso:

"(a) Provided, however, that nothing in this Order shall prevent any

however, provides the central support for the permanent injunction against giving any preference, advantage, or benefit on the basis of race or sex in hiring or promoting any employee.[16]

III

Respondents appealed to the California Court of Appeal. While their appeal was pending, this Court issued its decision in *University of California Regents* v. *Bakke*, 438 U. S. 265. Although we affirmed the judgment of the California Supreme Court to the extent that it had ordered the University to admit Bakke to its medical school, the opinions supporting that decision indicated that at least five Members of the Court rejected the legal theory on which the California Supreme Court had relied. Specifically, both the opinion of JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN and the opinion of JUSTICE POWELL unequivocally stated that race may be used as a factor in the admissions process in some circumstances.[17] To the extent that those opinions demonstrated that the California Su-

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person, in determining the assignments and job responsibilities of employees of the Department of Corrections, from considering, among other relevant factors, the race and sex of the employees in question." *Id.*, at G–2.

[16] The permanent injunction enjoins respondents "[f]rom hiring or promoting any employee in the Department of Corrections in which preference, advantage, or benefit is given to race, color, sex, or national origin." *Ibid.*

[17] JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN joined Part V–C of JUSTICE POWELL's opinion, which stated:

"In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed." 438 U. S., at 320.

See also *id.*, at 325 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.).

preme Court's interpretation of the Fourteenth Amendment was erroneous, they also demonstrated that the trial judge's faithful application of that court's *Bakke* rationale in this case was an insufficient basis for supporting the injunction.

With the guidance of this Court's decision in *Bakke*, the California Court of Appeal reversed the judgment and the injunction entered by the trial court in this case. Relying largely on JUSTICE POWELL's opinion in *Bakke*, the Court of Appeal concluded that race or sex could be used as a "plus" factor in personnel decisions that promoted a compelling state interest.[18] The court seemed to indicate that the trial court's finding No. 19 supported a conclusion that the State's interest in a safe and efficient prison system constituted such an interest.[19]

With respect to the challenge to hiring procedures, the Court of Appeal concluded that the evidence was insufficient to support finding No. 8 insofar as that finding related to preferences in favor of males over females or insofar as it

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[18] The court interpreted JUSTICE POWELL's opinion to permit consideration of race in the school admissions process to serve the compelling state interest of promoting ethnic diversity among the students if

"(1) '. . . race or ethnic background may be deemed a "plus" in a particular applicant's file, yet . . . does not insulate the individual from comparison with all other candidates for the available seats'; and (2) a candidate not credited with that 'plus' will be 'fairly and competitively' evaluated for all the seats without being 'totaliy excluded from a specific percentage' of them which has been restricted to a particular racial or ethnic group. [438 U. S., at] 316–319." 95 Cal. App. 3d, at 520, 157 Cal. Rptr., at 268.

[19] Although finding No. 19 related only to transfer and assignment policies, the court seemed to rely on that finding to support the threshold proposition that the State has a compelling state interest in the safe operation of its prison system:

"In its finding no. 19, the trial court effectively determined that the practices apply the prison-related realities of race and sex to the point of promoting a 'compelling state interest' in a safe and efficient correctional system." *Id.*, at 520–521, 157 Cal. Rptr., at 268.

related to the hiring of any employees.[20] References to the possibility of a retrial in other portions of the opinion,[21] imply that petitioners will have an opportunity to remedy any deficiencies in their proof of sex discrimination or racial discrimination in hiring.

With respect to the challenge to promotion practices, the Court of Appeal apparently believed that the trial court's finding of discrimination in finding No. 8 was inconsistent with the trial court's finding No. 19.[22] Although finding No.

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[20] "The terminal question is whether this record supports the declaration, in paragraph 1 of the judgment, that the department and Enomoto violated the Equal Protection Clause by 'discriminating' on the bases of race and sex in the 'hiring and promotion of employees.' The declaration rests on the trial court's finding (No. 8) that they had 'discriminated' in those respects by applying personnel practices from which 'preferences result in favor of certain ethnic groups or . . . of one sex.' (See fn. 5, *ante*.) According to our review of the evidence, it does not support a finding that 'preferences result' from the practices in favor of males or in the 'hiring' of employees. Finding No. 8 therefore fails to support the declaration in either respect." *Id.*, at 521, 157 Cal. Rptr., at 269.

[21] "If the case is to be retried, Justice Powell's decision in *U. S. Bakke* will be pertinent to the determination of either question. (See *U. S. Bakke, supra*, 438 U. S. 265 at pp. 307–310 . . . .)

. . . . . .

"These problems require examination if the case is to be retried." *Id.*, at 526, 157 Cal. Rptr., at 272.

[22] After the court cited finding No. 19 and identified the compelling state interest in the safe and efficient operation of the prison system, the court stated:

"The department is pursuing those objectives by assigning a female or minority employee a 'plus' in competition for promotion or transfer. The qualifications of other employees in the competition are still 'weighed fairly and competitively.'" *Id.*, at 521, 157 Cal. Rptr., at 268.

After concluding that the proof of discrimination was insufficient as to the hiring challenge, the court stated:

"The practices otherwise identified in [finding No. 8] have just been examined in light of *U. S. Bakke* and under the 'strict scrutiny' it commands. We conclude that they are permitted by the Equal Protection

19 clearly applies only to transfers, the court seems to have read that finding to identify a compelling state interest and then to have determined that the evidence adequately justified the use of race as a plus factor for promotions as well as transfers. The court, however, may have merely intended to identify a permissible analysis of the record that will be open to the trial court on remand.[23] If a final and definitive de-

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Clause within the limited extent that noncontrolling 'preferences result in favor of certain ethnic groups' for purposes of promotion or transfer of personnel within the department, because they are necessary to promote the compelling interest of this state in the proper management of its correctional system. For the same reasons, they are permitted insofar as the same limited 'preferences result' in favor of women. Finding No. 8 accordingly fails to support the declaration that the Department and Enomoto violated the Equal Protection Clause in any respect." *Id.*, at 521–522, 157 Cal. Rptr., at 269.

[23] In its discussion of finding No. 19, which applied only to transfers and work assignments, the court indicated that the record established that the Department was assigning minority employees a " 'plus' in competition for promotion or transfer." In its discussion of finding No. 8, which did relate to promotions, the court stated only that the Department's promotion practices are justified "within the limited extent that noncontrolling preferences result in favor of certain ethnic groups" and "insofar as the same limited 'preferences result' in favor of women." In its discussion of finding No. 8, the court did not state that such preferences in fact existed.

Even in its discussion of what the evidence at trial indicated, the Court of Appeal was somewhat equivocal:

"There was evidence that various male Caucasian employees had been denied promotion or transfer in instances where preference had been given to female or minority members.

. . . .

"Various supervisory employees of the department testified that preference for promotion or transfer was *not* given to female or minority employees in specified segments of the department after 1974. There was thus a conflict in the evidence as to how widely the preferential policies expressed in the AAP had been pursued within the department. According to all the evidence of instances where they had been applied, 'preference' was given to female sex or minority status only to the extent that each was considered a 'plus' factor in the assessment of a particular em-

termination of the federal issue was actually intended, it is difficult to understand why the court left open the possibility of retrial and did not unequivocally direct that judgment be entered in favor of respondents.

Recognizing that the evidence of past discrimination that had been proffered by respondents might be relevant in support of a defense that the affirmative-action program was justified as a remedy for past discrimination within the Department of Corrections,[24] the Court of Appeal also left open for the retrial the question whether that evidence should be received. Finally, the Court of Appeal rejected each of petitioners' contentions that a violation of state law or federal statutory law had been proved, and then concluded by noting that jurisdictional problems concerning petitioners' standing "require examination if the case is to be retried." [25]

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ployee for promotion or transfer. Some evidence supported the inference that this 'plus' had occasionally contributed to the promotion or transfer of the preferred employee ahead of nonpreferred candidates who were otherwise more qualified for the new position. There was no evidence that such 'preference' had ever resulted in the promotion or transfer of an employee who was *not* qualified to hold the position.

"Vacancies in specific positions were occasionally left open, and promotions or transfers to them were sometimes delayed, until qualified female or minority employees could be found to fill them. Some of these positions were labelled 'female only,' or with words similarly referring to sex (including 'male only') or to race or ethnic background. There was no evidence that any specific number or percentage of positions were reserved for members of either sex or of any racial or ethnic group." *Id.*, at 514–515, 157 Cal. Rptr., at 264.

[24] The trial court had found that the plan could not be justified as a remedy for past societal discrimination but had not addressed the question whether it would be justified by past departmental discrimination. See finding No. 13, App. to Pet. for Cert. F–5.

[25] 95 Cal. App. 3d, at 526, 157 Cal. Rptr., at 272. The Court of Appeal noted that the petitioners had not been permitted to maintain a class action, that the individuals had not proved that they were entitled to relief, and that CCOA did not represent all employees of the Department. Although the respondents had stipulated that the petitioners had stand-

IV

In this Court respondents, as well as the Solicitor General on behalf of the United States as *amicus curiae*, urge us to dismiss the writ because the judgment of the Court of Appeal is not final.[26] See *Gospel Army* v. *Los Angeles*, 331 U. S. 543. The judgment is clearly not final in the sense that no further proceedings can possibly take place in the state judicial system. Petitioners argue, however, that there is finality under our cases because the ultimate judgment on the federal issue is for all practical purposes preordained. This argument is supported by a representation made by petitioners' counsel at oral argument in this Court that the record already contains all of the evidence that they are prepared to offer.[27] Nevertheless, we are not persuaded that the outcome of further proceedings in the trial court can be characterized as "certain" or that these proceedings will not have a significant effect on the federal constitutional issues presented by the certiorari petition.[28]

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ing, the Court of Appeal stated that the trial court's jurisdiction could not be created by stipulation. *Ibid.*

[26] Petitioners have invoked this Court's jurisdiction under 28 U. S. C. § 1257 (3), which provides:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . . . .

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

[27] Tr. of Oral Arg. 20–21.

[28] The questions presented in the petition for certiorari are:

"1. Whether a state agency may, absent proof that it has engaged in previous intentional discrimination, voluntarily establish goals, set aside

In *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, this Court identified four categories of cases in which a state court's decision of a federal issue had been treated as a final judgment even though additional proceedings in the state trial court were anticipated. Petitioners contend that this case falls within the first of those categories—that it is a case in which "for one reason or another the federal issue is conclusive or the outcome of further proceedings is preordained." [29] That category is, however, delimited by a preliminary comment in the *Cox* opinion:

"In the cases in the first two categories considered below,

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positions and grant preferences, for the hiring and promotion of less qualified minorities and women, to the detriment of all other applicants and employees.

"2. Whether the safe and efficient operation of correctional facilities constitutes a sufficient compelling interest to justify the use of racial and sex-based preferences in hiring and promotion, and if so, whether proof of that interest was sufficiently supported by the record.

"3. Whether it is sufficient for a state agency to adopt preferential employment practices based solely upon conclusory allegations of the discriminatory impact of its past policies and practices on minorities and women.

"4. Whether it is appropriate for a state correctional institution to institute employment goals for minorities based upon inmate population rather than the relevant labor market or applicant flow.

"5. Whether the relevant labor force for the hiring of women should be based on state-wide employment statistics for women as opposed to applicant flow or the labor force statistics for women in the relevant geographic area in which the institutions are located." Pet. for Cert. 2–3.

[29] "In the first category are those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final. In *Mills* v. *Alabama*, 384 U. S. 214 (1966), for example, a demurrer to a criminal complaint was sustained on federal constitutional grounds by a state trial court. The State Supreme Court reversed, remanding for jury trial. This Court took jurisdiction on the reasoning that the appellant had no defense other than his

> the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question." *Id.*, at 478.

The answer to the question whether the further proceedings in the state trial court "have little substance" or are "wholly unrelated to the federal question" is affected not only by the specifics of the particular litigation but also by the extent to which the "policy of strict necessity in disposing of constitutional issues," *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568, is implicated.[30] In that case, not-

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federal claim and could not prevail at trial on the facts or any nonfederal ground. To dismiss the appeal 'would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets.' *Id.*, at 217–218 (footnote omitted)." 420 U. S., at 479.

[30] Commenting on the close connection between the policy of avoiding the premature adjudication of constitutional issues and the limitations on our jurisdiction, the Court wrote:

"Indeed in origin and in practical effects, though not in technical function, it is a corollary offshoot of the case and controversy rule. And often the line between applying the policy or the rule is very thin. They work, within their respective and technically distinct areas, to achieve the same practical purposes for the process of constitutional adjudication, and upon closely related considerations.

"The policy's ultimate foundations, some if not all of which also sustain the jurisdictional limitation, lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources

withstanding a conclusion that the Court had jurisdiction to entertain the appeal, *id.*, at 565–568, the Court's analysis of the policy of strict necessity provided "compelling reasons for not exercising" its mandatory appellate jurisdiction. *Id.*, at 568. Those reasons were the "highly abstract form" in which the constitutional issues were presented, *id.*, at 575–580, the "ambiguous" character of the California court's construction of the Los Angeles Municipal Code, *id.*, at 581–584, and a belief that further proceedings in the state court would ultimately tender "the underlying constitutional issues in clean-cut and concrete form." *Id.*, at 584.

In this case our analysis of the question whether the federal constitutional issues may be affected by additional proceedings in the state courts—and therefore take the case out of the first category of final judgments described in *Cox*—is similarly affected by ambiguities in the record, both as to the character of the petitioners' prima facie case and as to the character of the respondents' justification for their program.

Petitioners contend that the program was designed to give minority employees specific proportions of the available jobs in the Corrections Department. The trial court found that respondents "have discriminated and are continuing to discriminate by reason of sex and by reason of ethnic back-

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of enforcement; withal in the paramount importance of constitutional adjudication in our system.

"All these considerations and perhaps others, transcending specific procedures, have united to form and sustain the policy. Its execution has involved a continuous choice between the obvious advantages it produces for the functioning of government in all its coordinate parts and the very real disadvantages, for the assurance of rights, which deferring decision very often entails. On the other hand it is not altogether speculative that a contrary policy, of accelerated decision, might do equal or greater harm for the security of private rights, without attaining any of the benefits of tolerance and harmony for the functioning of the various authorities in our scheme. For premature and relatively abstract decision, which such a policy would be most likely to promote, have their part too in rendering rights uncertain and insecure." 331 U. S., at 570–572 (footnote omitted).

ground in hiring and promotion of employees in the Department." [31] Although that finding also recited that the discrimination was "motivated at least in part" by the affirmative-action plan, it did not indicate the extent to which such discrimination had occurred. Because the trial court interpreted the relevant constitutional law absolutely to prohibit any such discrimination in hiring or promotion, the court did not need to make any more specific finding. Several assumptions would therefore be consistent with the general finding of discrimination. One could assume either that all hiring and promotion decisions have been affected by the goal of achieving certain percentage quotas as to race and sex, or that race or sex has been a factor in only certain specific decisions. Included in the latter assumption are the two possibilities that race or sex was a factor in a fairly large number of random decisions, or that race or sex was a motivating factor only in connection with certain types of jobs with respect to which the Superior Court expressly permitted transfers or job assignments motivated by either the race or sex of the employee.[32] In sum, the Superior Court's findings do not go beyond a determination that there was some discrimination in hiring and promotion.

If we accept the Court of Appeal's interpretation of the record, we must assume that the respondents have used race as a factor in making promotion decisions but not in making hiring decisions.[33] Like the findings of the Superior Court,

[31] Finding No. 8, App. to Pet. for Cert. F–4.

[32] A third possibility is that a certain number of positions were "set aside" for particular ethnic groups or for females. Although the Court of Appeal decision seems to indicate that the Department did not establish such "controlling preferences," and that no evidence of any quota or percentage of positions set aside was introduced at trial, it is not entirely clear that the trial court would be foreclosed from making such a finding, nor is it entirely clear what the evidence at the first trial showed on this point. See n. 23, *supra;* n. 37, *infra;* Brief for Petitioners 5–9.

[33] The Court of Appeal opinion states that the evidence did not indicate that the Department employed "preferences" in hiring. See n. 20, *supra.*

however, the opinion of the Court of Appeal does not indicate whether race was considered relevant for *all* promotions or just in connection with promotions to particular positions. The fact that the Court of Appeal relied on the finding that race was a relevant factor in making certain job assignments to justify the use of race or sex in connection with promotions implies that the court thought race or sex had been a factor only in making promotions to a limited number of positions.[34] But the court did not so state expressly and it did not identify any specific position to which promotions or transfers motivated by race or sex had been made.

Thus on the one hand, if the first interpretation of the opinion is correct, and race was relevant only in making certain specific decisions, then adequate review of a narrow holding of that kind would require a more detailed identification of the particular positions involved than is now contained in findings that were prepared by the trial judge to support a quite different disposition of the case. On the other hand, if the Court of Appeal concluded that respondents had followed a general policy of using race as a factor in making promotions, and that such a policy was justified by the State's interest in a safe and efficient prison system, adequate review of a broad holding of that kind would require an understanding of how such a sweeping policy was implemented and why such a policy should be applied in the pro-

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It may be that preferences similar to the ones applied in the promotion context were used in the hiring context, but the Court of Appeal did not so conclude because petitioners failed in their proof of this issue. Thus although we must assume for purposes of this opinion that race and sex were not a factor in hiring, petitioners might be able to demonstrate the contrary on retrial. See n. 37, *infra*.

[34] Because the trial court had found, in finding No. 19, that consideration of race in making job assignments or transfers to certain specific positions may serve a compelling state interest, the Court of Appeal may have assumed that promotions motivated by race or sex took place only with respect to jobs to which racially motivated transfers would have been permissible.

motion context and not in the hiring context.[35] The trial court's findings contain no such explanation because the trial court did not find that respondents had engaged in any such bifurcated policy.[36]

An additional uncertainty concerning the precise issue to be decided is that the Court of Appeal expressed doubt concerning the trial court's jurisdiction over any claims asserted by CCOA and noted that petitioners Minnick and Darden were not entitled to damages or injunctive relief as individuals. 95 Cal. App. 3d, at 526, 157 Cal. Rptr., at 272. Because the trial court's denial of petitioners' motion to certify the case as a class action was predicated on a stipulation that the court had jurisdiction to grant declaratory relief without any such certification, and because the Court of Appeal held that jurisdiction could not be conferred by stipulation, it is at least possible that claims on behalf of additional employees or job applicants may be asserted on remand. They, as well as the present petitioners, will have the right—even though petitioners' counsel have no such present intent—to adduce additional evidence in support of the complaint, or to amend their pleadings in the light of the developments in the law that have occurred since the original complaint was filed.[37] Moreover, whether or not additional evidence is

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[35] Of course, if respondents did not really distinguish between hiring and promotion, then petitioners will need another opportunity to demonstrate respondents' unified policy.

[36] The text of the affirmative-action plan adopted in 1974 and revised in 1975 draws no such distinction between hiring and promotion.

[37] Under California law, an appellate court reversal of a trial court decision has the effect of vacating the judgment and returning the case to the trial court for a new trial "as if no judgment had ever been rendered." See *Erlin* v. *National Fire Ins. Co.*, 7 Cal. 2d 547, 549, 61 P. 2d 756, 757 (1936); *Salaman* v. *Bolt*, 74 Cal. App. 3d 907, 914, 141 Cal. Rptr. 841, 844 (1977). Thus the losing party on appeal may introduce additional evidence. See *Gospel Army* v. *Los Angeles*, 331 U. S. 543, 547–548, quoting *Erlin, supra*, at 549, 61 P. 2d, at 757. Although this rule regarding new

taken, the trial judge is unquestionably free to recast his findings in response to those legal developments.

Accordingly, because of significant developments in the law—and perhaps in the facts as well [38]—and because of significant ambiguities in the record concerning both the extent to which race or sex has been used as a factor in making promotions and the justification for such use, we conclude that we should not address the constitutional issues until the proceedings in the trial court are finally concluded and the state appellate courts have completed their review of the trial court record.

Accordingly, the writ of certiorari is dismissed.

So ordered.

JUSTICE REHNQUIST, concurring.

If I viewed this judgment of the California Court of Appeal as "final" under 28 U. S. C. § 1257, I would join the dissenting opinion of JUSTICE STEWART. Since I do not so view it, however, I join the opinion of the Court dismissing the writ of certiorari for want of jurisdiction.

JUSTICE BRENNAN, concurring in the judgment.

"In view of the ambiguities in the record as to the issues sought to be tendered," I would dismiss the writ of certiorari as improvidently granted. *Mitchell* v. *Oregon Frozen Foods Co.*, 361 U. S. 231 (1960); see *Doe* v. *Delaware*, 450 U. S. 382,

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trials does not apply if the appellate court did not intend a new trial, *Stromer* v. *Browning*, 268 Cal. App. 2d 513, 518–519, 74 Cal. Rptr. 155, 158 (1968), such as when the appellate court decides a dispositive issue which does not turn on facts which might change on retrial, *id.*, at 519, 74 Cal. Rptr., at 160, the Court of Appeal clearly contemplated a possible retrial here.

[38] Respondents have lodged with the Court a copy of a revised affirmative-action plan adopted in 1979. Further developments as to the Department's implementation of the AAP and changes reflected in the 1979 revision might affect the question of whether the petitioners' are now entitled to injunctive relief.

386, n. 10 (1981) (BRENNAN, J., dissenting); *Cowgill* v. *California*, 396 U. S. 371, 371–372 (1970) (Harlan, J., concurring).

JUSTICE STEWART, dissenting.

I would not dismiss the writ of certiorari. I would, to the contrary, reverse the judgment before us because the California Court of Appeal has wrongly held that the State may consider a person's race in making promotion decisions.[1]

So far as the Constitution goes, a private person may engage in any racial discrimination he wants, cf. *Steelworkers* v. *Weber*, 443 U. S. 193, but under the Equal Protection Clause of the Fourteenth Amendment a sovereign State may never do so.[2] And it is wholly irrelevant whether the State gives a "plus" or "minus" value to a person's race, whether the discrimination occurs in a decision to hire or fire or promote, or whether the discrimination is called "affirmative action" or by some less euphemistic term.[3]

A year ago I stated my understanding of the Constitution in this respect, and I repeat now a little of what I said then:

> "The equal protection standard of the Constitution has one clear and central meaning—it absolutely prohibits invidious discrimination by government. That standard must be met by every State under the Equal Protection Clause of the Fourteenth Amendment. . . .
>
> . . . . . .
>
> "Under our Constitution, the government may never act to the detriment of a person solely because of that person's race. The color of a person's skin and the country

[1] This ruling is "final" for purpose of the jurisdiction of this Court. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 482–483.

[2] It is self-evident folly to suppose that a person's race may constitutionally be taken into account, but that it must not be controlling.

[3] California's policy of racial discrimination was sought to be justified as an antidote for previous discrimination in favor of white people. But, even in this context, two wrongs do not make a right. Two wrongs simply make two wrongs.

of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government. . . . In short, racial discrimination is by definition invidious discrimination.

"The rule cannot be any different when the persons injured . . . are not members of a racial minority. . . .

. . . . . .

". . . Most importantly, by making race a relevant criterion, . . . the Government implicitly teaches the public that the apportionment of rewards and penalties can legitimately be made according to race—rather than according to merit or ability—and that people can, and perhaps should, view themselves and others in terms of their racial characteristics. . . .

"There are those who think that we need a new Constitution, and their views may someday prevail. But under the Constitution we have, one practice in which government may never engage is the practice of racism . . . ." *Fullilove* v. *Klutznick*, 448 U. S. 448, 523, 525–526, 532 (dissenting opinion) (footnote omitted).

I respectfully dissent.

McDANIEL ET AL. *v.* SANCHEZ ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-180. Argued March 2, 1981—Decided June 1, 1981

After holding that the apportionment plan for precincts from which county commissioners were elected to serve on the Commissioners Court for Kleberg County, Tex., was unconstitutional because of substantial population variances in the precincts, the District Court directed county officials to submit a proposed reapportionment plan to the court. The Commissioners Court then employed an expert to prepare a new plan and subsequently adopted his plan and submitted it to the District Court. The court approved the plan and authorized the Commissioners Court to conduct 1980 primary and general elections under it, rejecting respondents' contention that § 5 of the Voting Rights Act of 1965 (Act) required the county, a jurisdiction covered by the Act, to obtain preclearance from either the Attorney General of the United States or the United States District Court for the District of Columbia before the plan could become effective. The Court of Appeals vacated the District Court's order, holding that "[a] proposed reapportionment plan submitted by a local legislative body does not lose its status as a legislative rather than court-ordered plan merely because it is the product of litigation conducted in a federal forum," and that the Act required preclearance.

Held: Congress intended to require compliance with the statutory preclearance procedures under the circumstances of this case. Whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people—no matter what constraints have limited the choices available to them—the preclearance requirement of the Act is applicable. Pp. 137–153.

(a) The statement in *East Carroll Parish School Board* v. *Marshall*, 424 U. S. 636—which held that a court-adopted reapportionment plan suggested by the local legislative body there involved was a judicial plan for purposes of substantive review—that the plan was also a judicial plan for purposes of § 5 preclearance was dictum and does not control this case. Pp. 139–146.

(b) The language of § 5 does not unambiguously answer the question, but the legislative history of the 1975 amendments of the Act shows that it was intended that the statutory protections are to be available even

when redistricting by the governmental body is ordered by a federal court to remedy a constitutional violation that has been established in pending federal litigation. Pp. 146–153.

615 F. 2d 1023, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 153. STEWART, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 154.

Richard A. Hall argued the cause and filed a brief for petitioners.

Robert J. Parmley argued the cause for respondents. With him on the brief was *David G. Hall.*

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General McCree, Acting Assistant Attorney General Turner, Harriet S. Shapiro, Jessica Dunsay Silver,* and *Carol E. Heckman.**

JUSTICE STEVENS delivered the opinion of the Court.

We granted certiorari to decide whether the preclearance requirement of § 5 of the Voting Rights Act of 1965, as amended,[1] applies to a reapportionment plan submitted to a

*Briefs of *amici curiae* urging affirmance were filed by *John B. Jones, Jr., Norman Redlich, William L. Robinson, Norman J. Chachkin,* and *Beatrice Rosenberg* for the Lawyers' Committee for Civil Rights Under Law; and by *Neil Bradley, Laughlin McDonald, Christopher Coates, Bruce J. Ennis,* and *E. Richard Larson* for the American Civil Liberties Union.

[1] The Voting Rights Act was enacted in 1965, 79 Stat. 437, and was amended in 1970, 84 Stat. 314, and in 1975, 89 Stat. 400. In relevant part, § 5, 89 Stat. 404, as set forth in 42 U. S. C. § 1973c, now provides: "[W]henever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the third sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to

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Federal District Court by the legislative body of a covered jurisdiction [2] in response to a judicial determination that the existing apportionment of its electoral districts is unconstitutional. Relying on *East Carroll Parish School Board* v. *Marshall*, 424 U. S. 636 (*per curiam*), the District Court held

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voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made."

[2] Section 4 of the Act identifies the jurisdictions that are subject to the Act's prohibitions. One of the determinants of coverage is the use of a "test or device" as a prerequisite for registration or voting. See 42 U. S. C. §§ 1973b (b), (c). In 1975, Congress enlarged the coverage of the Act by changing the definition of "test or device" to protect non-English-speaking citizens who constitute more than 5% of the voting age population in any jurisdiction. The amendment provides:

"In addition to the meaning given the term under subsection (c) of this section, the term 'test or device' shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority." 89 Stat. 401–402, 42 U. S. C. § 1973b (f)(3).

As a result of this amendment, Texas and its political subdivisions became covered jurisdictions. See *Briscoe* v. *Bell*, 432 U. S. 404.

that the plan submitted to it in this case was a judicial plan and thus excepted from the requirements of § 5. Relying on *Wise* v. *Lipscomb*, 437 U. S. 535, the Court of Appeals for the Fifth Circuit reversed; it held that because the plan had been prepared by a legislative body, it was a legislative plan within the coverage of § 5. We are persuaded that Congress intended to require compliance with the statutory preclearance procedures under the circumstances of this case. Accordingly, we affirm the judgment of the Court of Appeals.

The covered jurisdiction in this case is Kleberg County, a rural county in Texas. Under Texas law, a Commissioners Court, which is composed of four county commissioners presided over by the county judge, is authorized to govern Kleberg County. The county is divided periodically by the Commissioners Court into four commissioners' precincts, each of which elects a resident to the position of county commissioner. The county judge is elected at large. The county commissioners and the county judge serve 4-year terms.[3]

In January 1978, four Mexican-American residents of Kleberg County brought this class action against various county officials alleging that the apportionment of the four commissioners' precincts denied individual residents of the larger precincts a vote of equal weight, and unconstitutionally diluted the voting strength of the county's substantial Mexican-American population.[4] After a trial,[5] the District Court re-

[3] See generally Tex. Const., Art. 5, § 18; Tex. Rev. Civ. Stat. Ann., Art. 2351 (Vernon 1971). Elections are staggered in the four precincts so that two commissioners are elected every two years.

[4] The District Court certified two classes of Kleberg County voters as plaintiffs: (1) the class of all registered voters who were denied a vote of equal weight in the election of county commissioners due to the malapportionment of the commissioners' precincts; and (2) the class of all Mexican-American voters whose voting power had been diluted under the Kleberg County apportionment plan. See App. to Pet. for Cert. A–2, A–4.

[5] In February 1978, the District Court had refused to grant the plaintiffs preliminary relief enjoining the May 1978 primary elections, relying in part on the uncertainty of the statistical data presented by the

jected the plaintiffs' claim that the county's apportionment plan unconstitutionally diluted the voting power of Mexican-Americans as a class, but held that individual voters were denied equal representation because of the substantial disparity in the number of residents in each commissioners' precinct.[6] The District Court therefore directed the county officials to submit a proposed reapportionment plan to the court within six weeks, and scheduled a hearing on the validity of the proposal for four weeks thereafter.[7]

Pursuant to the District Court's order, the Commissioners Court undertook the task of devising a new apportionment plan. The Commissioners Court employed Dr. Robert Nash, a statistician and the Dean of the College of Business at Texas A. & I. University, to prepare a new plan, instructing him to define the commissioners' precincts "on a one-person/one-vote basis."[8] With one insignificant modifica-

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plaintiffs to establish their claim of malapportionment. After the primary election, the Court of Appeals vacated the District Court's order denying a preliminary injunction and remanded for reconsideration in the light of its decision in *Lister* v. *Commissioners Court*, 566 F. 2d 490 (1978), which held that a Commissioners Court "had a clear duty to reapportion on the basis of the 1970 Census." *Id.*, at 492. Upon remand, the case proceeded to trial in the District Court.

[6] The 1970 census indicated that Kleberg County had 33,166 residents. If the precinct boundaries had been drawn to achieve perfect population equality, each precinct would have had 8,291 residents. In fact, however, the largest precinct contained 9,928 residents and the smallest only 6,702. The maximum deviation from the largest precinct to the smallest was therefore 38.9%. See App. to Pet. for Cert. A–5. This apportionment plan had been adopted in 1968, and the precincts had not been reapportioned following the 1970 census.

[7] In ordering the defendants to submit a proposed reapportionment plan, the District Court noted: "The initial burden of fashioning a constitutionally permissible remedy is on the County Commissioners Court." *Id.*, at A–19.

[8] Although the Commissioners Court employed Dr. Nash, he was not given extensive instructions with respect to preparation of the reapportion-

tion,[9] the Commissioners Court officially adopted the plan prepared by Dr. Nash as the plan it would submit to the District Court.

Respondents objected to the proposed plan. They challenged the data used by the Dean, they claimed that the plan diluted the voting strength of Mexican-Americans, and they contended that the Voting Rights Act required the county to obtain preclearance from the Attorney General of the United States or the United States District Court for the District of Columbia before the plan could become effective.[10] After an evidentiary hearing, the District Court rejected both of respondents' factual contentions, and held as a matter of law that the Voting Rights Act did not require preclearance. The court entered an order approving the new plan and authorizing the Commissioners Court to conduct the 1980 primary and general elections under it. See App. to Pet. for Cert. A–21 to A–23.

Without expressing any opinion with respect to the constitutionality of the new plan, the Court of Appeals vacated

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ment plan. Dr. Nash's testimony in the District Court reveals that the plan's details were left largely within his discretion:

"Q. What instructions did you receive at the time of notification from Judge McDaniel in reference to drafting the new plan?

. . . . .

"A. They wanted it broken down on a one-person/one-vote basis and that was the extent of their input on how I would do it." App. 25.

The Commissioners Court did not ask Dr. Nash to take into consideration geographical boundaries, previous county maintenance districts, or the ethnic balance of individual precincts. *Id.*, at 26. In drafting the plan, Dr. Nash was primarily influenced by population considerations; he also attempted to stay within the boundaries of existing voting precincts as much as possible. *Id.*, at 29–30.

[9] After Dr. Nash submitted his proposal, the Commissioners Court asked him to redraw one boundary in order to locate the county courthouse in Precinct One instead of Precinct Four. Because there were no residents on the only block affected by this change, see *id.*, at 28, no one contends that it was significant for purposes of this litigation.

[10] See n. 1, *supra*.

the District Court's order in a *per curiam* opinion. See 615 F. 2d 1023 (1980). Reasoning that "[a] proposed reapportionment plan submitted by a local legislative body does not lose its status as a legislative rather than court-ordered plan merely because it is the product of litigation conducted in a federal forum," *id.*, at 1024, the Court of Appeals held that the Voting Rights Act required preclearance. The court thereafter denied petitioners' application for a stay pending filing and consideration of a petition for writ of certiorari. On August 14, 1980, however, JUSTICE POWELL, in his capacity as Circuit Justice, entered an order recalling the mandate and staying the judgment of the Court of Appeals pending disposition of the petition for certiorari. 448 U. S. 1318. We granted that petition because the question presented is important and because the answer suggested by our prior opinions is not free of ambiguity. 449 U. S. 898.[11]

In this Court, the county officials contend that the Voting Rights Act does not apply to a plan that "(a) was prepared and presented in response to an order by the district court, (b) was not prepared by county officials but by a third party expert, (c) was not adopted by the county before submission to the court, (d) was considered by the trial court to be court-ordered, and (e) was put into effect only after county officials were ordered to do so by the trial court." [12]

We first consider the significance of the distinction between legislative and court-ordered plans as identified in our prior cases. We then review our decisions in *East Carroll*

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[11] As JUSTICE POWELL noted in granting petitioners' application for a stay:

"It is fair to say that the opinions in *East Carroll* and *Wise* v. *Lipscomb* fall considerably short of providing clear guidance to the courts that initially address this difficult issue. It would be helpful, therefore, for this Court to exercise its responsibility to provide such guidance." 448 U. S., at 1322.

[12] Pet. for Cert. I; see also Brief for Petitioners II.

and *Wise* v. *Lipscomb*, on which the District Court and the Court of Appeals respectively placed primary reliance. Finally, we examine the statute and its legislative history.

I

Texas and its political subdivisions are covered by the Voting Rights Act. *Briscoe* v. *Bell*, 432 U. S. 404.[13] Section 5 of that Act is applicable whenever a covered jurisdiction "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972 . . . ." 42 U. S. C. § 1973c. A reapportionment plan is a "standard, practice, or procedure with respect to voting" within the meaning of § 5, *Georgia* v. *United States*, 411 U. S. 526, 531–535, and it is undisputed that Kleberg County is a covered jurisdiction. What is in dispute is whether that jurisdiction did "enact or seek to administer" a proposed reapportionment plan when it presented that plan to a Federal District Court as a proposed remedy for a constitutional violation. If the statute does apply, then the plan must be precleared either by the Attorney General of the United States or the United States District Court for the District of Columbia before it may become effective.[14] In such a preclearance proceeding, it is not sufficient to demonstrate that the new plan is constitutional; the covered jurisdiction also has the burden of demonstrating that the districting changes are not motivated by a discriminatory purpose and will not have an adverse impact on minority voters. See, *e. g.*, *City of Rome* v. *United States*, 446 U. S. 156, 172–173.

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[13] See n. 2, *supra*.

[14] In our prior decisions construing the Act, we have described in detail the preclearance procedures. See, *e. g.*, *Allen* v. *State Board of Elections*, 393 U. S. 544; *South Carolina* v. *Katzenbach*, 383 U. S. 301; *Georgia* v. *United States*, 411 U. S. 526; *Morris* v. *Gressette*, 432 U. S. 491.

Two polar propositions are perfectly clear. First, the Act requires preclearance of new legislative apportionment plans that are adopted without judicial direction or approval. See *Georgia* v. *United States, supra.* Second, the Act's preclearance requirement does not apply to plans prepared and adopted by a federal court to remedy a constitutional violation. See *Connor* v. *Johnson,* 402 U. S. 690 (*per curiam*).[15] Petitioners contend that the Act does not apply to this reapportionment plan because it is a court-ordered plan, while respondents argue that the Act does apply because the plan was prepared and submitted on behalf of the local legislative body.

In prior reapportionment cases not arising under the Voting Rights Act, we have recognized important differences between legislative plans and court-ordered plans. Because "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court," *Chapman* v. *Meier,* 420 U. S. 1, 27, the Court has tolerated somewhat greater flexibility in the fashioning of legislative remedies for violation of the one-person, one-vote rule than when a federal court prepares its own

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[15] In *Johnson,* the Court summarily rejected the suggestion that an apportionment plan formulated by a federal court must be submitted for preclearance under § 5:

"A decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act." 402 U. S., at 691.

In his dissenting opinion in *Johnson,* Justice Black added:

"Needless to say I completely agree with the holding of the majority that a reapportionment plan formulated and ordered by a federal district court need not be approved by the United States Attorney General or the United States District Court for the District of Columbia. Under our constitutional system it would be strange indeed to construe § 5 of the Voting Rights Act of 1965, 79 Stat. 439, 42 U. S. C. § 1973c (1964 ed., Supp. V), to require that actions of a federal court be stayed and reviewed by the Attorney General or the United States District Court for the District of Columbia." *Id.,* at 695.

remedial decree. Thus, in *Chapman* we held that "unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts, and, as well, must ordinarily achieve the goal of population equality with little more than *de minimis* variation." *Id.*, at 26–27 (footnote omitted).[16] In contrast, reapportionment plans prepared by legislative bodies may employ multimember districts and may result in greater population disparities than would be permitted in a court-ordered plan. See *Connor* v. *Finch*, 431 U. S. 407, 414–415. Cf. *Mahan* v. *Howell*, 410 U. S. 315.

In this case, we are concerned only with the question whether the reapportionment plan submitted to the District Court should be considered a legislative plan for purposes of preclearance under § 5. We are not presented with any question concerning the substantive acceptability of that plan. Nonetheless, we draw significant guidance from prior cases in which the substantive acceptability of a reapportionment plan, rather than the applicability of § 5, was at issue.

II

In neither of the cases on which the respective parties now place their primary reliance did the Court predicate its decision on the Voting Rights Act. In both of those cases, the question before the Court was whether it was error for the District Court to approve the inclusion of a multimember district in the reapportionment plan under review.

In *East Carroll Parish School Board* v. *Marshall*, 424 U. S. 636 (*per curiam*), the plaintiff contended that population disparities among the parish's wards had unconstitutionally denied him the right to cast an effective vote for representatives to the school board and the police jury, the governing body of the parish. The District Court found that the

[16] *Chapman* involved reapportionment of the Legislature of North Dakota, a jurisdiction that is not covered by the Voting Rights Act.

parish's existing apportionment was unconstitutional. As a remedy, the court adopted a reapportionment plan, suggested by the police jury, that provided for at-large election of the members of both the police jury and the school board. Following the 1970 census, the District Court directed the police jury and school board to submit revised reapportionment plans. They resubmitted the plan calling for at-large elections, and the District Court again approved this plan. After a divided panel of the Court of Appeals affirmed the District Court's decision,[17] the court sitting en banc reversed on the ground that the multimember arrangement approved by the District Court was unconstitutional.[18]

When we reviewed the case, we concluded that it was improper for the Court of Appeals to base its decision on a constitutional ground in view of the fact that the District Court had violated the frequently reaffirmed "rule that when United States district courts are put to the task of fashioning reapportionment plans to supplant concededly invalid state legislation, single-member districts are to be preferred absent unusual circumstances." *Id.*, at 639. Thus, we held in *East Carroll* that the plan approved by the District Court was a judicial plan for purposes of substantive review.

Although the issue was not raised by the parties, we also stated in *East Carroll* that the plan was a judicial plan for purposes of § 5 preclearance. Neither of the parties had argued that § 5's preclearance requirement was applicable in that case. However, the United States, as *amicus curiae*, had contended that, because the plan had been submitted by the

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[17] See *Zimmer* v. *McKeithen*, 467 F. 2d 1381 (CA5 1972).

[18] See *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (CA5 1973) (en banc). In the Court of Appeals, the appellants had also argued that the at-large election was not permitted by state law because the Louisiana statute that authorized the use of multimember districts had never become effective since it had not been precleared pursuant to § 5 of the Voting Rights Act. See 485 F. 2d, at 1301–1302, and n. 7.

legislative bodies of a covered jurisdiction, preclearance was required. We rejected that argument in a footnote:

> "[C]ourt-ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by § 5. Had the East Carroll police jury reapportioned itself on its own authority, clearance under § 5 of the Voting Rights Act would clearly have been required. *Connor* v. *Waller,* 421 U. S. 656 (1975). However, in submitting the plan to the District Court, the jury did not purport to reapportion itself in accordance with the 1968 enabling legislation . . . which permitted police juries and school boards to adopt at-large elections. App. 56. Moreover, since the Louisiana enabling legislation was opposed by the Attorney General of the United States under § 5 of the Voting Rights Act, the jury did not have the authority to reapportion itself. . . . Since the reapportionment scheme was submitted and adopted pursuant to court order, the preclearance procedures of § 5 do not apply. *Connor* v. *Johnson,* 402 U. S. 690, 691 (1971)." 424 U. S., at 638–639, n. 6.

Petitioners rely heavily upon this footnote. While their reliance is understandable, the footnote is not dispositive in this case. The discussion of § 5 in *East Carroll* was dictum unnecessary to the decision in that case. It is, therefore, not controlling in this case, in which the impact of § 5 is directly placed in issue.[19] Moreover, our subsequent decision in *Wise*

[19] THE CHIEF JUSTICE, in his concurring opinion in *East Carroll,* pointed out that the Court's discussion of the preclearance issue was dictum:

"I consider it unnecessary to reach the question discussed, *ante,* at 638–639, n. 6. It was, as the Court observes in n. 6, 'not raised by the petitioners, nor did respondent file a cross-petition.' The scope of § 5 of the Voting Rights Act is an important matter, and I would not undertake to express any view on what the Court discusses by way of dicta in n. 6." 424 U. S., at 640.

To the extent that the dictum in the *East Carroll* footnote is inconsistent with our holding today, that dictum is disavowed.

v. *Lipscomb*, 437 U. S. 535, indicates that, at least to the extent that *East Carroll* addressed the Voting Rights Act, it must be narrowly limited to its particular facts.

In *Wise* v. *Lipscomb*, the District Court held that the system of at-large election to the Dallas City Council unconstitutionally diluted the voting strength of black citizens. The court thereafter gave the City Council an opportunity to prepare and submit a new apportionment plan. In response, the City Council passed a resolution stating the Council's intention to pass an ordinance providing for the election of eight council members from single-member districts, and for the election of the three remaining members from the city at large. The District Court conducted a hearing " 'to determine the constitutionality of the new proposed plan' " and held that it was "a valid legislative Act." See 437 U. S., at 538–539. The Court of Appeals reversed, relying on *East Carroll* to hold that it was error for the District Court merely to evaluate the new plan under constitutional standards without also deciding whether exceptional circumstances justified the inclusion of a multimember district in that judicially imposed reapportionment plan. See 551 F. 2d 1043 (CA5 1977).

The question this Court addressed was whether the District Court had committed error by failing to apply the usual presumption against multimember districts in judicial reapportionment plans. In his opinion announcing the judgment of the Court, JUSTICE WHITE, joined by JUSTICE STEWART, answered that question by holding that the presumption did not apply because it is "appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." 437 U. S., at 540. JUSTICE WHITE distinguished *East Carroll* on the ground that the legislative bodies in that case had not purported to reapportion themselves and, indeed, had been without power to reapportion

themselves under state law because the Louisiana enabling statute had been invalidated under the Voting Rights Act.[20] The Dallas City Council, in contrast, had acted within its inherent legislative authority in devising and submitting a reapportionment plan to replace the plan invalidated by the District Court in *Wise*. See 437 U. S., at 545–546.

JUSTICE POWELL's separate opinion concurring in part and concurring in the judgment, was joined by the THE CHIEF JUSTICE, JUSTICE BLACKMUN, and JUSTICE REHNQUIST. JUSTICE POWELL agreed with JUSTICE WHITE's conclusion that the Dallas reapportionment plan was a legislative plan for purposes of the application of the presumption against multimember districts. However, relying upon *Burns* v. *Richardson*, 384 U. S. 73, JUSTICE POWELL disagreed with JUSTICE WHITE's suggestion that *East Carroll* had held that a proposed reapportionment plan may be considered legislative only if the legislative body that suggested the plan had authority to enact it under state law. 437 U. S., at 548.[21] In

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[20] JUSTICE WHITE explained why *East Carroll* did not support the judgment of the Court of Appeals:

"[W]e emphasized [in *East Carroll*] that the bodies which submitted the plans did not purport to reapportion themselves and, furthermore, could not even legally do so under federal law because state legislation providing them with such powers had been disapproved by the Attorney General of the United States under § 5 of the Voting Rights Act of 1965. 424 U. S., at 638 n. 6, 637 n. 2. Under these circumstances, it was concluded that the mere act of submitting a plan was not the equivalent of a legislative Act of reapportionment performed in accordance with the political processes of the community in question." 437 U. S., at 545.

[21] The District Court in *Burns*, after striking down Hawaii's Senate apportionment scheme, directed the legislature to enact a proposed interim plan pending the constitutional amendment required for reapportionment under Hawaii law. See 384 U. S., at 80–81. The legislature complied with the court's order, but the court found the proposed interim plan unacceptable. On appeal, this Court treated the proposed plan as a legislative plan, despite the fact that the Hawaii Legislature was without power to reapportion itself absent a constitutional amendment.

JUSTICE POWELL's view, the legislative body's authority under state law was irrelevant to the question before the Court. He explained that the critical difference between a legislative plan and a court-imposed plan for purposes of substantive review was that the former reflected the policy choices of the elected representatives of the people, whereas the latter represented the remedial directive of a federal court.[22] Deference to the judgment of the legislative body was required even if that body lacked authority under state law to adopt the proposed reapportionment plan.[23]

In dissent, JUSTICE MARSHALL, joined by JUSTICE BRENNAN and JUSTICE STEVENS, expressed the opinion that *Wise* was indistinguishable from *East Carroll* and that the Court of Appeals therefore had correctly applied the presumption

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[22] JUSTICE POWELL's opinion made it plain that the crucial factor was the legislature's exercise of its judgment, not its legislative power:

"The essential point is that the Dallas City Council exercised a legislative judgment, reflecting the policy choices of the elected representatives of the people, rather than the remedial directive of a federal court. . . . Th[e] rule of deference to local legislative judgments remains in force even if, as in *Burns*, our examination of state law suggests that the local body lacks authority to reapportion itself." 437 U. S., at 548.

[23] In reaching this conclusion, JUSTICE POWELL read *East Carroll* "as turning on its peculiar facts":

"Because the brief *per curiam* in *East Carroll* did not even cite *Burns*, I would read it as turning on its peculiar facts. In response to the litigation in *East Carroll*, the legislature enacted a statute enabling police juries and school boards to reapportion themselves by employing at-large elections. That enabling legislation was disapproved by the Attorney General of the United States under § 5 of the Voting Rights Act of 1965 . . . because of its impermissible impact on Negro voters. This determination meant that the specific plans proposed by the school board and police jury in that case would have had unlawful effects. Because their legislative judgment had been found tainted in that respect, it followed that the normal presumption of legitimacy afforded the balances reflected in legislative plans . . . could not be indulged. To the extent that *East Carroll* implies anything further about the principle established in *Burns*, the latter must be held to control." 437 U. S., at 549.

against multimember districts. 437 U. S., at 550–554. JUSTICE MARSHALL, however, agreed with the majority that it would not be proper to reach any question under the Voting Rights Act because Texas had not been subject to the Act when the case was pending in the District Court.[24]

While it is clear that *Wise*, like *East Carroll*, did not require the Court to decide any statutory issue, the references to § 5 of the Voting Rights Act in JUSTICE WHITE's opinion announcing the judgment of the Court are nevertheless instructive. After pointing out that "the distinctive impact" of § 5 upon the power of the States to reapportion themselves must be observed in the normal case, 437 U. S., at 541–542, JUSTICE WHITE stated:

> "Plans imposed by court order are not subject to the requirements of § 5, but under that provision, a State or political subdivision subject to the Act may not 'enact or seek to administer' any 'different' voting qualification or procedure with respect to voting without either obtaining a declaratory judgment from the United States District Court for the District of Columbia that the pro-

[24] At the outset of his opinion, JUSTICE MARSHALL summarized his position:

"I agree with the majority's decision not to reach the Voting Rights Act question, since it was not presented to either of the courts below. I also agree with the analysis of our past decisions found in Part II of MR. JUSTICE WHITE's opinion. I cannot agree, however, that the actions of the Dallas City Council are distinguishable from those of the local governing body in *East Carroll Parish School Bd.* v. *Marshall*, 424 U. S. 636 (1976). I therefore conclude that the plan ordered by the District Court here must be evaluated in accordance with the federal common law of remedies applicable to judicially devised reapportionment plans." *Id.*, at 550.

In his opinion announcing the judgment of the Court, JUSTICE WHITE pointed out that Texas had not been subject to the Voting Rights Act when the case was pending in the District Court. *Id.*, at 542. JUSTICE POWELL also agreed with the decision not to address the Voting Rights Act. *Id.*, at 549.

> posed change 'does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color' or submitting the change to the Attorney General and affording him an appropriate opportunity to object thereto. A new reapportionment plan enacted by a State, including one purportedly adopted in response to invalidation of the prior plan by a federal court, will not be considered 'effective as law,' *Connor* v. *Finch*, 431 U. S., at 412; *Connor* v. *Waller*, 421 U. S. 656 (1975), until it has been submitted and has received clearance under § 5. Neither, in those circumstances, until clearance has been obtained, should a court address the constitutionality of the new measure. *Connor* v. *Finch, supra; Connor* v. *Waller, supra.*" *Id.*, at 542 (footnote omitted).

Neither *East Carroll* nor *Wise* decided the precise question that is now presented. Nonetheless, both JUSTICE WHITE's opinion and JUSTICE POWELL's opinion surely foreshadowed the holding we announce today. For both opinions indicate that the fact that the reapportionment plan before us was devised in response to an order of a federal court does not change its character as a legislative plan. In addition, JUSTICE POWELL's opinion indicates that the Commissioners Court's power under Texas law to adopt this plan should be irrelevant to the decision in this case.

III

This is not a case in which the language of the controlling statute unambiguously answers the question presented. The Solicitor General, on behalf of the United States as *amicus curiae*, contends that a covered jurisdiction "seek[s] to administer" a new voting practice when it submits a redistricting plan to a district court as a proposed remedy for a constitutional violation. This is a plausible but not an obviously correct reading of the statutory language. For there is force to the contrary argument that Kleberg County had no in-

tention to administer any new plan until after it was given legal effect by incorporation in a judicial decree. Arguably, therefore, the statute has no application before the District Court enters its decree, and because the Act does not require the District Court to have its decisions precleared, see *Connor* v. *Johnson*, 402 U. S. 690, once such a decree is entered it is too late for the statute to qualify the county's duty to administer the plan as entered by the District Court. We find sufficient ambiguity in the statutory language to make it appropriate to turn to legislative history for guidance.

In 1975, when Congress adopted the amendments that ultimately brought Texas and Kleberg County within the coverage of the Act, it directed special attention to § 5 and to the redistricting that would be required after the 1980 census.[25] In its Report on S. 1279, the bill that extended the life of the Voting Rights Act beyond 1975, the Senate Committee on the Judiciary explained "the future need for the Act" by pointing out that redrafting of district lines to correct violations of the one-person, one-vote rule created opportunities to disenfranchise minority voters.[26] "By providing that Sec-

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[25] Because the 1975 extension of the Voting Rights Act is the controlling statute in this case, the legislative history of that extension is of particular relevance. See *Dougherty County Board of Education* v. *White*, 439 U. S. 32, 46.

[26] The Senate Report emphasized the importance of the preclearance procedure:

"The provisions of S. 1279 propose to amend the Act so that the special remedies, including Section 5 preclearance, will be operative for an additional ten years. Although the 1965 legislation and the 1970 amendments did, in large part, provide for only five year coverage periods at a time, the Committee concludes that it is imperative that a ten year extension now be adopted in order to insure the applicability of Section 5 protections during the reapportionment and redistricting which will take place subsequent to the 1980 Decennial Census.

"Approximately one-third of the Justice Department's objections have been to redistrictings at the state, county and city levels. (S. Hearings 539–540, 581–582). This past experience ought not be ignored in terms

tion 5 protections not be removed before 1985, S. 1279 would guarantee Federal protection of minority voting rights during the years that the post-census redistrictings will take place." [27]

The Committee unambiguously stated that the statutory protections are to be available even when the redistricting is ordered by a federal court to remedy a constitutional violation that has been established in pending federal litigation. The Committee Report is crystal clear on this point:

> "Thus, for example, where a federal district court holds unconstitutional an apportionment plan which predates the effective date of coverage under the Voting Rights Act, any subsequent plan ordinarily would be subject to Section 5 review. In the typical case, the court either will direct the governmental body to adopt a new plan and present it to the court for consideration or else itself choose a plan from among those presented by various parties to the litigation. In either situation, the court should defer its consideration of—or selection among—any plans presented to it until such time as these plans have been submitted for Section 5 review. Only after such review should the district court proceed to any remaining fourteenth or fifteenth amendment questions that may be raised.
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> "The one exception where Section 5 review would not ordinarily be available is where the court, because of

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of assessing the future need for the Act. It is ironic that the Supreme Court's 'one man-one vote' ruling [*Reynolds* v. *Sims*, 377 U. S. 533 (1964)] has created opportunities to disfranchise minority voters. Having to redraft district lines in compliance with that ruling, jurisdictions may not always take care to avoid discriminating against minority voters in that process. By providing that Section 5 protections not be removed before 1985, S. 1279 would guarantee Federal protection of minority voting rights during the years that the post-census redistrictings will take place." S. Rep. No. 94–295, pp. 17–18 (1975) (footnote omitted) (Senate Report).

[27] *Id.*, at 18.

exigent circumstances, actually fashions the plan itself instead of relying on a plan presented by a litigant. This is the limited meaning of the 'court decree' exception recognized in *Connor* v. *Johnson*, 402 U. S. 690 (1971). Even in these cases, however, if the governmental body subsequently adopts a plan patterned after the court's plan, Section 5 review would be required, *Connor* v. *Waller*, supra. Furthermore, in fashioning the plan, the court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases." Senate Report, at 18–19.[28]

The view expressed by the Committee is consistent with the basic purposes of the statute and with the well-settled rule that § 5 is to be given a broad construction. See, *e. g.*, *Dougherty County Board of Education* v. *White*, 439 U. S. 32, 38; *United States* v. *Sheffield Board of Commissioners*, 435 U. S. 110, 122–123; *Perkins* v. *Matthews*, 400 U. S. 379, 387. The preclearance procedure is designed to forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process.[29] The federal interest in preventing local jurisdictions from making changes that adversely affect the rights of minority voters is the same whether a change is required to remedy a constitutional violation or is merely the product of a community's

[28] The Committee went on to state that, in its judgment, § 5 had been properly applied by the District Court in *Gaillard* v. *Young*, No. 74–1265 (SC 1975). In *Gaillard*, the District Court invalidated an existing apportionment plan and directed that any remedial plan proposed by the parties be precleared by the Attorney General before it would be embodied in a final decree. Senate Report, at 19. In their brief in this case, petitioners conceded that *Gaillard* "involved facts identical to those in this case." Brief for Petitioners 25.

[29] See, *e. g.*, *South Carolina* v. *Katzenbach*, 383 U. S. 301; *Allen* v. *State Board of Elections*, 393 U. S. 544.

perception of the desirability of responding to new social patterns.[30]

It is true, of course, that the federal interest may be protected by the federal district court presiding over voting rights litigation, but sound reasons support the Committee's view that the normal § 5 preclearance procedures should nevertheless be followed in cases such as this.[31] The procedures

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[30] Moreover, even after a federal court has found a districting plan unconstitutional, "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise* v. *Lipscomb*, 437 U. S., at 539 (opinion of WHITE, J.). See also *Chapman* v. *Meier*, 420 U. S. 1, 27. Our prior decisions in the apportionment area indicate that, in the normal case, a court that has invalidated a State's existing apportionment plan should enjoin implementation of that plan and give the legislature an opportunity to devise an acceptable replacement before itself undertaking the task of reapportionment. See, *e. g.*, *Reynolds* v. *Sims*, 377 U. S. 533, 585–586; *Maryland Committee* v. *Tawes*, 377 U. S. 656, 676; *Davis* v. *Mann*, 377 U. S. 678, 693; *Ely* v. *Klahr*, 403 U. S. 108, 114, and n. 6. Cf. *Gaffney* v. *Cummings*, 412 U. S. 735, 749. "[J]udicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Reynolds*, *supra*, at 586; *Burns* v. *Richardson*, 384 U. S., at 85. Thus, in the normal case, the legislature will enact an apportionment plan to replace that invalidated by the court; such a plan clearly must be precleared under § 5. See *Connor* v. *Waller*, 421 U. S. 656 (*per curiam*).

[31] Our decision in *United States* v. *Board of Supervisors of Warren County*, 429 U. S. 642 (*per curiam*), illustrates that a District Court's conclusion that a reapportionment plan proposed by a covered jurisdiction complies with constitutional requirements is not a substitute for § 5 review. In *Warren County*, the Attorney General filed a § 5 action in the District Court. The court enjoined the county from implementing an apportionment plan that had not been precleared under § 5, and directed it to submit a new plan for preclearance. When the county was unable to obtain the Attorney General's approval for either of two proposed plans, it submitted the plans to the District Court. The court adopted one of the plans despite the county's failure to obtain the Attorney General's approval, finding that the plan neither diluted minority voting strength nor violated the one-person, one-vote principle. *Id.*, at 643–644. This Court reversed,

contemplated by the statute reflect a congressional choice in favor of specialized review—either by the Attorney General of the United States or by the United States District Court for the District of Columbia. Because a large number of voting changes must necessarily undergo the preclearance process, centralized review enhances the likelihood that recurring problems will be resolved in a consistent and expeditious way.[32] Moreover, if covered jurisdictions could avoid the normal preclearance procedure by awaiting litigation challenging a refusal to redistrict after a census is completed, the statute might have the unintended effect of actually encouraging delay in making obviously needed changes in district boundaries. The federal interest in evenhanded review of all changes in covered jurisdictions is furthered by the application of the statute in cases such as this.

The application of the statute is not dependent on a showing that the county's proposed plan is defective in any way. Cf. *United States* v. *Board of Supervisors of Warren County*, 429 U. S. 642 (*per curiam*); *Morris* v. *Gressette*, 432 U. S. 491. The prophylactic purposes of the § 5 remedy are achieved by automatically requiring "review of *all* voting changes prior to implementation by the covered jurisdictions." Senate Report, at 15 (emphasis supplied).[33] It is therefore not material that the plan submitted by the Com-

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holding that it was error for the District Court to determine the constitutional validity of the county's plan and to order that it be implemented, rather than limiting its inquiry in the § 5 suit to the question whether the county had complied with § 5.

[32] For example, in 1976, covered jurisdictions submitted 7,470 proposed changes to the Department of Justice for preclearance under § 5; the Department interposed objections to 62 of those submissions. See Hearings before the Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary, GAO Report on the Voting Rights Act, 95th Cong., 2d Sess., 35–36 (1978) (statement of Drew S. Days III, Assistant Attorney General, Civil Rights Division).

[33] See also H. R. Rep. No. 94–196, pp. 5, 8–11 (1975); H. R. Rep. No. 91–397, pp. 6–8 (1969).

missioners Court of Kleberg County in this case was actually prepared by an independent expert. His expertise may facilitate the satisfactory completion of the preclearance process, but it does not obviate the preclearance requirement itself. For just as the reasons for the county's decision to propose a new plan are irrelevant to the statutory preclearance requirement, so also is the particular method that is employed in formulating the plan that is submitted to the court on behalf of the county irrelevant.

The application of the statute also is not dependent upon any showing that the Commissioners Court had authority under state law to enact the apportionment plan at issue in this case.[34] As JUSTICE POWELL pointed out in *Wise* v. *Lipscomb*, 437 U. S. 535, the essential characteristic of a legislative plan is the exercise of legislative judgment. The fact that particular requirements of state law may not be satisfied before a plan is proposed to a federal court does not alter this essential characteristic. The applicability of § 5 to specific

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[34] The parties appear to agree that the Commissioners Court had authority under Texas law to redraw the boundaries of the commissioners' precincts. Petitioners contend, however, that the Commissioners Court was without power to adopt the particular apportionment plan at issue in this case because it is permitted to redraw the boundaries of *election* precincts only in a July or August term. The plan in this case was submitted to the District Court in November and was approved by that court in January. See Tex. Elec. Code Ann., Art. 2.04 (1) (Vernon Supp. 1980). Election precincts are subunits of commissioners' precincts that determine where a voter registers and votes. Because the reapportionment plan submitted by the Commissioners Court resulted in the splitting of several election precincts between two commissioners' precincts, petitioners contend that the plan altered the boundaries of election precincts in violation of state law. Since we conclude that the Commissioners Court's authority under Texas law to enact this plan is irrelevant for purposes of § 5 coverage, we need not resolve this question of state law. At any rate, it is clear that the Commissioners Court possesses general authority to reapportion itself; petitioners challenge only the timing of the submission and adoption of the plan in this case.

remedial plans is a matter of federal law that federal courts should determine pursuant to a uniform federal rule.

As we construe the congressional mandate, it requires that whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people—no matter what constraints have limited the choices available to them—the preclearance requirement of the Voting Rights Act is applicable.[35] It was, therefore, error for the District Court to act on the county's proposed plan before it had been submitted to the Attorney General or the United States District Court for the District of Columbia for preclearance.

The judgment of the Court of Appeals is therefore affirmed.

It is so ordered.

JUSTICE POWELL, concurring.

The decision today is foreshadowed by *Wise* v. *Lipscomb*, 437 U. S. 535 (1978), and I join the Court's opinion. The constitutionality of § 5 of the Voting Rights Act of 1965 has been sustained by prior cases. If the question were presented for reconsideration, I would adhere to the contrary view as previously expressed. *City of Rome* v. *United States*, 446 U. S. 156, 193 (1980) (POWELL, J., dissenting); *Dougherty County Bd. of Ed.* v. *White*, 439 U. S. 32, 48 (1978) (POWELL, J., dissenting); *Georgia* v. *United States*, 411 U. S. 526, 545 (1973) (POWELL, J., dissenting). See also *United States* v. *Sheffield Board of Commissioners*, 435 U. S. 110, 141 (1978) (STEVENS, J., dissenting); *Allen* v. *State Board of Elections*, 393 U. S. 544, 586, and n. 4 (1969) (Harlan, J., concurring

[35] Petitioners argue that the interposition of a preclearance requirement will encourage dilatory tactics by incumbents who will continue to represent malapportioned districts during the review process. The district courts, however, have ample power to fashion interim remedies to avoid problems of this character.

in part and dissenting in part); *South Carolina* v. *Katzenbach*, 383 U. S. 301, 358 (1966) (Black, J., concurring and dissenting).*

JUSTICE STEWART, with whom JUSTICE REHNQUIST joins, dissenting.

In *East Carroll Parish School Bd.* v. *Marshall*, 424 U. S. 636, 638–639, n. 6, the Court expressly stated that a reapportionment scheme which is submitted and adopted pursuant to a court order does not have to be approved through the preclearance procedures of § 5 of the Voting Rights Act. This statement represented the deliberate and considered view of the Court, as demonstrated by the presence of a separate opinion in the case questioning the Court's resolution of the issue. See *id.*, at 640 (concurring opinion). Because I believe that what the Court said in the *East Carroll* case expressly controls the result in this case, I respectfully dissent.

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*In his dissent, Justice Black stated that his "objection to § 5 is that [it] . . . conflict[s] with the most basic principles of the Constitution." 383 U. S., at 358. Justice Black added:

"Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless. One of the most basic premises upon which our structure of government was founded was that the Federal Government was to have certain specific and limited powers and no others, and all other power was to be reserved either 'to the States respectively, or to the people.' Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them." *Id.*, at 358–359.

The right freely to vote must be safeguarded vigilantly. If a state law denies or impairs this right, in violation of the Constitution or of a valid federal law, the courts are the proper and traditional forum for redress.

FORD MOTOR CREDIT CO. *v.* CENANCE ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-1205. Decided June 1, 1981

Held:

1. Under pertinent provisions of the Truth in Lending Act, 15 U. S. C. § 1601 *et seq.*, and an implementing regulation, petitioner company, as the assignee from automobile dealers of retail installment contracts, is a creditor within the meaning of the Act. Although each dealer *arranged* for the extension of credit to the automobile buyer, petitioner actually *extended* the credit. The sales were contingent upon petitioner's approval of the buyer's credit worthiness, and the dealer's acceptance of the sales contract and the assignment to petitioner became operational simultaneously, the assignment divesting the dealer of any risk in the transaction.

2. A statement on the retail installment contracts notifying the buyer that the contract was "assigned to [petitioner] in accordance with the terms of the Assignment set forth on the reverse side hereof," is a sufficient disclosure of petitioner's creditor status for purposes of the Act.

Certiorari granted in part; 621 F. 2d 130, affirmed in part and reversed in part.

PER CURIAM.

The motion of the American Bankers Association for leave to file a brief as *amicus curiae* is granted. The motion of the California Bankers Association for leave to file a brief as *amicus curiae* is granted.

These cases were consolidated in the Court of Appeals. *Cenance* v. *Bohn Ford Co.*, 621 F. 2d 130 (CA5 1980). In each, a prospective purchaser of an automobile entered into an installment sales transaction with an automobile dealer. Prior to completion of the transaction the dealer submitted the buyer's credit application to petitioner Ford Motor Credit Co. (FMCC). Once the dealer was notified that the buyer met FMCC's credit standards, the buyer and the dealer ex-

ecuted a retail installment contract. On each contract the following legend appeared: "The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of the Assignment set forth on the reverse side hereof." Pursuant to the arrangement between the dealer and FMCC, FMCC purchased each contract without recourse against the dealer. Although FMCC did not assist in the actual negotiations, it provided the dealer with credit forms, including blank retail installment contracts. Although each did so, none of the dealers was obligated to seek financing from FMCC in perfecting its sales transaction.

Subsequently, each buyer brought suit in Federal District Court, alleging violations of the Truth in Lending Act, 82 Stat. 146, as amended, 15 U. S. C. § 1601 *et seq.* The allegations common to all suits were that FMCC was a creditor within the meaning of the Act and that the statement concerning assignment to FMCC did not adequately disclose that status.[1] The respective District Courts agreed and the Court of Appeals for the Fifth Circuit affirmed. In determining that FMCC was a creditor, the Court of Appeals relied upon its prior decision in *Meyers* v. *Clearview Dodge Sales, Inc.*, 539 F. 2d 511 (1976). There the court had held under similar facts that it would be elevating form over substance to characterize a party such as FMCC, there Chrysler Credit Corp., as anything but a creditor. In the immediate case, the court reiterated that point:

"The *Meyers* analysis applies with even greater force

[1] In addition to the failure to disclose creditor status, three of the plaintiffs, Cenance, Strzelecki, and Booker, alleged that tag, title, and registration fees should have been separately disclosed, 12 CFR § 226.4 (b)(4) (1980); Cenance also averred that a $1 lien recordation fee should have been separately itemized as a fee paid to public officials, § 226.4 (b)(1); and Shropshire and Wiggs alleged that documentary fees should not have been included in the cash-price disclosure since they were in fact part of the financing charge.

> to the instant situation because here the dealers regularly dealt only with Ford. The dealer and Ford prearranged for the assignment of the finance instrument. At no time did the risk of finance reside with the dealer. The transaction between dealer and automobile purchaser was conditioned upon acceptance of the credit application by Ford. Indeed, the credit application form was prepared by Ford. As in *Meyers*, it would be elevating form over substance to hold that Ford was anything but an original creditor within the meaning of the Act and Regulation Z." 621 F. 2d, at 133.

Having concluded that FMCC was a creditor within the meaning of the Act, the Court of Appeals went on to hold that the statement in the retail sales agreement notifying the buyer of the assignment to FMCC was an insufficient disclosure of creditor status in violation of 12 CFR § 226.6 (d) (1980). The court also held that FMCC was liable for certain other Truth in Lending Act violations pertinent to each particular suit.

FMCC's petition for certiorari challenges these holdings. We grant the petition in major part,[2] affirm the holding that FMCC is a creditor within the meaning of the Act, but reverse the holding that the statement revealing the assignment to FMCC was not a sufficient disclosure of creditor status to satisfy § 226.6 (d).

The Truth in Lending Act, as it stood prior to recent amendments, defined creditors in pertinent part as those "who regularly extend, or arrange for the extension of, credit . . . ." 15 U. S. C. § 1602 (f). Regulation Z, pro-

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[2] There were additional violations sustained by the Court of Appeals. The Court of Appeals rejected FMCC's claim that under § 226.6 (d) one of these violations should not have been attributed to it since the violation was beyond the "purview" of its relationship with the dealer. We deny FMCC's petition for certiorari insofar as it challenges the Court of Appeals' judgment in this respect.

mulgated pursuant to the Act, defines the term consistently with the above: " 'Creditor' means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit . . . ." 12 CFR § 226.2 (s) (1980). On the facts of this case, the above definition easily encompasses both the dealers and FMCC.[3] Each dealer *arranged* for the extension of credit but FMCC actually *extended* the credit. The facts negate any suggestion that the dealers anticipated financing any of these transactions. The sales were contingent upon FMCC's approval of the credit worthiness of the buyer. The acceptance of the contract and the assignment became operational simultaneously, and the assignment divested the dealer of any risk in the transaction. In short, we agree with the Court of Appeals that it would be elevating form over substance to conclude that FMCC is not a creditor within the meaning of the Act.[4]

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[3] Absent a clear indication of legislative intent to the contrary, the statutory language controls its construction. In addition, the regulations promulgated by the governmental body responsible for interpreting or administering a statute are entitled to considerable respect, *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 450 (1978), and this is particularly true under the Truth in Lending Act, see *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 566–567 (1980). These rules are fully applicable here.

[4] FMCC does contend, however, that there is an indication in the legislative history that under facts such as these a finance institution should be treated as a subsequent assignee and be afforded the more limited liability that status carries. See 15 U. S. C. § 1614. In this regard petitioner cites the failure of Congress to adopt an amendment to the Act which would have limited the applicability of § 1614 to those subsequent assignees not "in a continuing business relationship with the original creditor." 114 Cong. Rec. 1611 (1968). The failure to adopt this provision, in petitioner's view, indicates an intent to confer upon a financial institution that maintains a continuing business relationship with a particular seller, the status of subsequent assignee. There is little or no force to this position. The proposed provision merely addressed the liability of those subsequent assignees who had a continuing business relationship with the original creditor. The mere fact that joint

Equally formalistic, however, is the conclusion below that the statement notifying the buyer of the assignment to FMCC was an insufficient disclosure of FMCC's creditor status. As the Court of Appeals recognized, other Courts of Appeals that have addressed this precise point have held that such a statement adequately disclosed FMCC's role in the transactions. *Sharp* v. *Ford Motor Credit Co.*, 615 F. 2d 423, 426 (CA7 1980); *Augusta* v. *Marshall Motor Co.*, 614 F. 2d 1085, 1086 (CA6 1979); *Milhollin* v. *Ford Motor Credit Co.*, 588 F. 2d 753, 756–757 (CA9 1978), rev'd on other grounds, 444 U. S. 555 (1980). Those courts have reasoned that the statement notifying the buyer that the contract was, upon acceptance, assigned to FMCC served the purpose of the Act by disclosing the nature of the relationship of the finance company to the transaction. It was unnecessary precisely to characterize FMCC as a "creditor." Contrary to the court below, we agree with those Courts of Appeals that have found the notification of assignment to be a sufficient disclosure of creditor status. As we stated in *Ford Motor Credit Co.* v. *Milhollin, supra:*

> "The concept of 'meaningful disclosure' that animates TILA . . . cannot be applied in the abstract. *Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between 'competing considerations of complete disclosure . . . and the need to avoid . . . [informational overload].'" 444 U. S., at 568.

Here, requiring more disclosure would not meaningfully benefit the consumer and consequently would not serve the purposes of the Act.

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creditors had a continuing business relationship with one another would not entitle either creditor to the status of subsequent assignee. The failure to adopt the amendment says nothing about the liability of one who is an original creditor within the meaning of the Act. A nominal assignee who in fact is the original extender of credit is not a subsequent assignee within the meaning of § 1614.

The decision of the Court of Appeals is accordingly affirmed in part and reversed in part.

So ordered.

JUSTICE MARSHALL would grant the petition for writ of certiorari because of the conflict among the Circuits and set the cases for plenary consideration.

Syllabus

COUNTY OF WASHINGTON, OREGON, ET AL. *v.* GUNTHER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80–429. Argued March 23, 1981—Decided June 8, 1981

While Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate in his employment practices on the basis of sex, the last sentence of § 703 (h) of Title VII (Bennett Amendment) provides that it shall not be an unlawful employment practice for any employer to differentiate upon the basis of sex in determining the amount of its employees' wages if such differentiation is "authorized" by the Equal Pay Act of 1963. The latter Act, 29 U. S. C. § 206 (d), prohibits employers from discriminating on the basis of sex by paying lower wages to employees of one sex than to employees of the other for performing equal work, "except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." Respondents, women who were employed as guards in the female section of petitioner county's jail until this section was closed, filed suit under Title VII for backpay and other relief, alleging, *inter alia*, that they had been paid lower wages than male guards in the male section of the jail and that part of this differential was attributable to intentional sex discrimination, since the county set the pay scale for female guards, but not for male guards, at a level lower than that warranted by its own survey of outside markets and the worth of the jobs. The District Court rejected this claim, ruling as a matter of law that a sex-based wage discrimination claim cannot be brought under Title VII unless it would satisfy the equal work standard of the Equal Pay Act. The Court of Appeals reversed.

Held: The Bennett Amendment does not restrict Title VII's prohibition of sex-based wage discrimination to claims for equal pay for "equal work." Rather, claims for sex-based wage discrimination can also be brought under Title VII even though no member of the opposite sex holds an equal but higher paying job, provided that the challenged wage rate is not exempted under the Equal Pay Act's affirmative defenses as to wage differentials attributable to seniority, merit, quantity or quality of production, or any other factor other than sex. Pp. 167–181.

(a) The language of the Bennett Amendment—barring sex-based wage discrimination claims under Title VII where the pay differential is "authorized" by the Equal Pay Act—suggests an intention to incorporate into Title VII only the affirmative defenses of the Equal Pay Act, not its prohibitory language requiring equal pay for equal work, which language does not "authorize" anything at all. Nor does this construction of the Amendment render it superfluous. Although the first three affirmative defenses are redundant of provisions elsewhere in § 703 (h) of Title VII, the Bennett Amendment guarantees a consistent interpretation of like provisions in both statutes. More importantly, incorporation of the fourth affirmative defense could have significant consequences for Title VII litigation. Pp. 168–171.

(b) The Bennett Amendment's legislative background is fully consistent with this interpretation, and does not support an alternative ruling. Pp. 171–176.

(c) Although some of the earlier interpretations of the Bennett Amendment by the Equal Employment Opportunity Commission may have supported the view that no claim of sex discrimination in compensation may be brought under Title VII except where the Equal Pay Act's "equal work" standard is met, other Commission interpretations frequently adopted the opposite position. And the Commission, in its capacity as *amicus curiae*, now supports respondents' position. Pp. 177–178.

(d) Interpretation of the Bennett Amendment as incorporating only the affirmative defenses of the Equal Pay Act draws additional support from the remedial purposes of the statutes, and interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate, must be avoided. Pp. 178–180.

(e) The contention that respondents' interpretation of the Bennett Amendment places the pay structure of virtually every employer and the entire economy at risk and subject to scrutiny by the federal courts, is inapplicable here. Respondents contend that the county evaluated the worth of their jobs and determined that they should be paid approximately 95% as much as the male officers; that it paid them only about 70% as much, while paying the male officers the full evaluated worth of their jobs; and that the failure of the county to pay respondents the full evaluated worth of their jobs can be proved to be attributable to intentional sex discrimination. Thus, the suit does not require a court to make its own subjective assessment of the value of the jobs, or to attempt by statistical technique or other method to quantify the effect of sex discrimination on the wage rates. Pp. 180–181.

602 F. 2d 882 and 623 F. 2d 1303, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART and POWELL, JJ., joined, *post*, p. 181.

Lawrence R. Derr argued the cause and filed a brief for petitioners.

Carol A. Hewitt argued the cause and filed a brief for respondents.

Barry Sullivan argued the cause for the United States et al. as *amici curiae* urging affirmance. With him on the brief were *Solicitor General McCree, Acting Assistant Attorney General Turner, Deputy Solicitor General Wallace, Walter W. Barnett, Neil H. Cogan,* and *Leroy D. Clark.**

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether § 703 (h) of Title VII of the Civil Rights Act of 1964, 78 Stat. 257, 42 U. S. C. § 2000e–2 (h), restricts Title VII's prohibition of sex-based wage discrimination to claims of equal pay for equal work.

I

This case arises over the payment by petitioner County of Washington, Ore., of substantially lower wages to female

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*Briefs of *amici curiae* urging affirmance were filed by *Bruce J. Ennis, Jr., Isabelle Katz Pinzler, E. Richard Larson,* and *Joan E. Bertin* for the American Civil Liberties Union et al.; by *Richard B. Sobol, Michael B. Trister, Laurence Gold, J. Albert Woll, Winn Newman, Carole Wilson, John Fillion, Susan Silber,* and *Catherine Waelder* for the American Federation of Labor and Congress of Industrial Organizations et al.; and by *Norman Redlich, William L. Robinson, Norman J. Chachkin, Beatrice Rosenberg,* and *Richard T. Seymour* for the Lawyer's Committee for Civil Rights Under Law et al.

Briefs of *amici curiae* were filed by *Kenneth C. McGuiness, Robert E. Williams,* and *Douglas S. McDowell* for the Equal Employment Advisory Council et al.; and by *Lawrence Z. Lorber* and *Robin M. Schachter* for the American Society for Personnel Administration.

guards in the female section of the county jail than it paid to male guards in the male section of the jail.[1] Respondents are four women who were employed to guard female prisoners and to carry out certain other functions in the jail.[2] In January 1974, the county eliminated the female section of the jail, transferred the female prisoners to the jail of a nearby county, and discharged respondents. 20 FEP Cases 788, 790 (Ore. 1976).

Respondents filed suit against petitioners in Federal District Court under Title VII, 42 U. S. C. § 2000e *et seq.*, seeking backpay and other relief.[3] They alleged that they were paid unequal wages for work substantially equal to that performed by male guards, and in the alternative, that part of the pay differential was attributable to intentional sex discrimination.[4] The latter allegation was based on a claim

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[1] Prior to February 1, 1973, the female guards were paid between $476 and $606 per month, while the male guards were paid between $668 and $853. Effective February 1, 1973, the female guards were paid between $525 and $668, while salaries for male guards ranged from $701 to $940. 20 FEP Cases 788, 789 (Ore. 1976).

[2] Oregon requires that female inmates be guarded solely by women, Ore. Rev. Stat. §§ 137.350, 137.360 (1979), and the District Court opinion indicates that women had not been employed to guard male prisoners. 20 FEP Cases, at 789, 792, nn. 8, 9. For purposes of this litigation, respondents concede that gender is a bona fide occupational qualification for some of the female guard positions. See 42 U. S. C. § 2000e–2 (e)(1); *Dothard* v. *Rawlinson*, 433 U. S. 321 (1977).

[3] Respondents could not sue under the Equal Pay Act because the Equal Pay Act did not apply to municipal employees until passage of the Fair Labor Standards Amendments of 1974, 88 Stat. 55, 58–62. Title VII has applied to such employees since passage of the Equal Employment Opportunity Act of 1972, § 2 (1), 86 Stat. 103.

[4] Respondents also contended that they were discharged and not rehired in retaliation for their demands for equal pay. Respondent Vander Zanden also contended that she was denied medical leave in retaliation for such demands. The District Court rejected those contentions, and the Court of Appeals affirmed. Those claims are not before this Court.

that, because of intentional discrimination, the county set the pay scale for female guards, but not for male guards, at a level lower than that warranted by its own survey of outside markets and the worth of the jobs.

After trial, the District Court found that the male guards supervised more than 10 times as many prisoners per guard as did the female guards, and that the females devoted much of their time to less valuable clerical duties. It therefore held that respondents' jobs were not substantially equal to those of the male guards, and that respondents were thus not entitled to equal pay. 20 FEP Cases, at 791. The Court of Appeals affirmed on that issue, and respondents do not seek review of the ruling.

The District Court also dismissed respondents' claim that the discrepancy in pay between the male and female guards was attributable in part to intentional sex discrimination. It held as a matter of law that a sex-based wage discrimination claim cannot be brought under Title VII unless it would satisfy the equal work standard of the Equal Pay Act of 1963, 29 U. S. C. § 206 (d).[5] 20 FEP Cases, at 791. The court therefore permitted no additional evidence on this claim, and made no findings on whether petitioner county's pay scales for female guards resulted from intentional sex discrimination.

The Court of Appeals reversed, holding that persons alleging sex discrimination "are not precluded from suing under Title VII to protest . . . discriminatory compensation practices" merely because their jobs were not equal to higher paying jobs held by members of the opposite sex. 602 F. 2d 882, 891 (CA9 1979), supplemental opinion on denial of rehearing, 623 F. 2d 1303, 1313, 1317 (1980). The court remanded to the District Court with instructions to take evidence on respondents' claim that part of the difference between their rate of pay and that of the male guards is attributable to sex

[5] See *infra*, at 168.

discrimination. We granted certiorari, 449 U. S. 950 (1980), and now affirm.

We emphasize at the outset the narrowness of the question before us in this case. Respondents' claim is not based on the controversial concept of "comparable worth," [6] under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community.[7] Rather, respondents seek to prove, by direct evidence, that their wages were depressed because of intentional sex discrimination, consisting of setting the wage scale for female guards, but not for male guards, at a level lower than its own survey of outside markets and the worth of the jobs warranted. The narrow question in this case is whether such a claim is precluded by the last sentence of § 703 (h) of Title VII, called the "Bennett Amendment." [8]

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[6] The concept of "comparable worth" has been the subject of much scholarly debate, as to both its elements and its merits as a legal or economic principle. See, *e. g.*, E. Livernash, Comparable Worth: Issues and Alternatives (1980); Blumrosen, Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964, 12 U. Mich. J. L. Ref. 397 (1979); Nelson, Opton, & Wilson, Wage Discrimination and the "Comparable Worth" Theory in Perspective, 13 U. Mich. J. L. Ref. 231 (1980). The Equal Employment Opportunity Commission has conducted hearings on the question, see BNA Daily Labor Report Nos. 83–85 (Apr. 28–30, 1980), and has commissioned a study of job evaluation systems, see D. Treiman, Job Evaluation: An Analytic Review (1979) (interim report).

[7] Respondents thus distinguish *Lemons* v. *City and County of Denver*, 620 F. 2d 228 (CA10), cert. denied, 449 U. S. 888 (1980), on the ground that the plaintiffs, nurses employed by a public hospital, sought increased compensation on the basis of a comparison with compensation paid to employees of comparable value—other than nurses—in the community, without direct proof of intentional discrimination.

[8] We are not called upon in this case to decide whether respondents have stated a prima facie case of sex discrimination under Title VII, cf. *Christensen* v. *Iowa*, 563 F. 2d 353 (CA8 1977), or to lay down standards for the further conduct of this litigation. The sole issue we decide is whether respondents' failure to satisfy the equal work standard of the Equal Pay Act in itself precludes their proceeding under Title VII.

II

Title VII makes it an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." 42 U. S. C. § 2000e–2 (a). The Bennett Amendment to Title VII, however, provides:

> "It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206 (d) of title 29." 42 U. S. C. § 2000e–2 (h).

To discover what practices are exempted from Title VII's prohibitions by the Bennett Amendment, we must turn to § 206 (d)—the Equal Pay Act—which provides in relevant part:

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 77 Stat. 56, 29 U. S. C. § 206 (d)(1).

On its face, the Equal Pay Act contains three restrictions pertinent to this case. First, its coverage is limited to those

employers subject to the Fair Labor Standards Act. S. Rep. No. 176, 88th Cong., 1st Sess., 2 (1963). Thus, the Act does not apply, for example, to certain businesses engaged in retail sales, fishing, agriculture, and newspaper publishing. See 29 U. S. C. §§ 203 (s), 213 (a) (1976 ed. and Supp. III). Second, the Act is restricted to cases involving "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U. S. C. § 206 (d)(1). Third, the Act's four affirmative defenses exempt any wage differentials attributable to seniority, merit, quantity or quality of production, or "any other factor other than sex." *Ibid.*

Petitioners argue that the purpose of the Bennett Amendment was to restrict Title VII sex-based wage discrimination claims to those that could also be brought under the Equal Pay Act, and thus that claims not arising from "equal work" are precluded. Respondents, in contrast, argue that the Bennett Amendment was designed merely to incorporate the four affirmative defenses of the Equal Pay Act into Title VII for sex-based wage discrimination claims. Respondents thus contend that claims for sex-based wage discrimination can be brought under Title VII even though no member of the opposite sex holds an equal but higher paying job, provided that the challenged wage rate is not based on seniority, merit, quantity or quality of production, or "any other factor other than sex." The Court of Appeals found respondents' interpretation the "more persuasive." 623 F. 2d, at 1311. While recognizing that the language and legislative history of the provision are not unambiguous, we conclude that the Court of Appeals was correct.

A

The language of the Bennett Amendment suggests an intention to incorporate only the affirmative defenses of the Equal Pay Act into Title VII. The Amendment bars sex-based wage discrimination claims under Title VII where the

pay differential is "authorized" by the Equal Pay Act. Although the word "authorize" sometimes means simply "to permit," it ordinarily denotes affirmative enabling action. Black's Law Dictionary 122 (5th ed. 1979) defines "authorize" as "[t]o empower; to give a right or authority to act." [9] Cf. 18 U. S. C. § 1905 (prohibiting the release by federal employees of certain information "to any extent not authorized by law"); 28 U. S. C. § 1343 (1976 ed., Supp. III) (granting district courts jurisdiction over "any civil action authorized by law"). The question, then, is what wage practices have been affirmatively authorized by the Equal Pay Act.

The Equal Pay Act is divided into two parts: a definition of the violation, followed by four affirmative defenses. The first part can hardly be said to "authorize" anything at all: it is purely prohibitory. The second part, however, in essence "authorizes" employers to differentiate in pay on the basis of seniority, merit, quantity or quality of production, or any other factor other than sex, even though such differentiation might otherwise violate the Act. It is to these provisions, therefore, that the Bennett Amendment must refer.

Petitioners argue that this construction of the Bennett Amendment would render it superfluous. See *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955). Petitioners claim that the first three affirmative defenses are simply redundant of the provisions elsewhere in § 703 (h) of Title VII that already exempt bona fide seniority and merit systems and systems measuring earnings by quantity or quality of production,[10] and that the fourth defense—"any other

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[9] Similarly, Webster's Third New International Dictionary 147 (1976) states that the word "authorize" "indicates endowing formally with a power or right to act, usu. with discretionary privileges." (Examples deleted.)

[10] Section 703 (h), as set forth in 42 U. S. C. § 2000e–2 (h), provides in relevant part:

"Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different

factor other than sex"—is implicit in Title VII's general prohibition of sex-based discrimination.

We cannot agree. The Bennett Amendment was offered as a "technical amendment" designed to resolve any potential conflicts between Title VII and the Equal Pay Act. See *infra*, at 173. Thus, with respect to the first three defenses, the Bennett Amendment has the effect of guaranteeing that courts and administrative agencies adopt a consistent interpretation of like provisions in both statutes. Otherwise, they might develop inconsistent bodies of case law interpreting two sets of nearly identical language.

More importantly, incorporation of the fourth affirmative defense could have significant consequences for Title VII litigation. Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971). The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination. H. R. Rep. No. 309, 88th Cong., 1st Sess., 3 (1963). Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of "other factors other than sex." [11] Under the Equal

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standards of compensation, or different terms, conditions, or privileges of employment *pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production* . . . provided that such differences are not the result of an intention to discriminate because of . . . sex . . . ." (Emphasis added.)

[11] The legislative history of the Equal Pay Act was examined by this Court in *Corning Glass Works* v. *Brennan*, 417 U. S. 188, 198–201 (1974). The Court observed that earlier versions of the Equal Pay bill were

Pay Act, the courts and administrative agencies are not permitted to "substitute their judgment for the judgment of the employer . . . who [has] established and applied a bona fide job rating system," so long as it does not discriminate on the basis of sex. 109 Cong. Rec. 9209 (1963) (statement of Rep. Goodell, principal exponent of the Act). Although we do not decide in this case how sex-based wage discrimination litigation under Title VII should be structured to accommodate the fourth affirmative defense of the Equal Pay Act, see n. 8, *supra*, we consider it clear that the Bennett Amendment, under this interpretation, is not rendered superfluous.

We therefore conclude that only differentials attributable to the four affirmative defenses of the Equal Pay Act are "authorized" by that Act within the meaning of § 703 (h) of Title VII.

B

The legislative background of the Bennett Amendment is fully consistent with this interpretation.

Title VII was the second bill relating to employment discrimination to be enacted by the 88th Congress. Earlier, the same Congress passed the Equal Pay Act "to remedy what was perceived to be a serious and endemic problem of [sex-based] employment discrimination in private industry," *Corning Glass Works* v. *Brennan*, 417 U. S. 188, 195 (1974). Any possible inconsistency between the Equal Pay

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amended to define equal work and to add the fourth affirmative defense because of a concern that bona fide job-evaluation systems used by American businesses would otherwise be disrupted. *Id.*, at 199–201. This concern is evident in the remarks of many legislators. Representative Griffin, for example, explained that the fourth affirmative defense is a "broad principle," which "makes clear and explicitly states that a differential based on any factor or factors other than sex would not violate this legislation." 109 Cong. Rec. 9203 (1963). See also *id.*, at 9196 (remarks of Rep. Frelinghuysen); *id.*, at 9197–9198 (remarks of Rep. Griffin); *ibid.*, (remarks of Rep. Thompson); *id.*, at 9198 (remarks of Rep. Goodell); *id.*, at 9202 (remarks of Rep. Kelly); *id.*, at 9209 (remarks of Rep. Goodell); *id.*, at 9217 (remarks of Reps. Pucinski and Thompson).

Act and Title VII did not surface until late in the debate over Title VII in the House of Representatives, because, until then, Title VII extended only to discrimination based on race, color, religion, or national origin, see H. R. Rep. No. 914, 88th Cong., 1st Sess., 10 (1963), while the Equal Pay Act applied only to sex discrimination. Just two days before voting on Title VII, the House of Representatives amended the bill to proscribe sex discrimination, but did not discuss the implications of the overlapping jurisdiction of Title VII, as amended, and the Equal Pay Act. See 110 Cong. Rec. 2577–2584 (1964). The Senate took up consideration of the House version of the Civil Rights bill without reference to any committee. Thus, neither House of Congress had the opportunity to undertake formal analysis of the relation between the two statutes.[12]

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[12] To answer certain objections raised by Senators concerning the House version of the Civil Rights bill, Senator Clark, principal Senate spokesman for Title VII, drafted a memorandum, printed in the Congressional Record. One such objection and answer concerned the relation between Title VII and the Equal Pay Act:

"Objection: The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitations in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.

"Answer: The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike title VII. Furthermore, under title VII, jobs can no longer be classified as to sex, except where there is a rational basis for discrimination on the ground of bona fide occupational qualification. The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII." 110 Cong. Rec. 7217 (1964).

This memorandum constitutes the only formal discussion of the relation between the statutes prior to consideration of the Bennett Amendment. It need not concern us here, because it relates to Title VII before it was

Several Senators expressed concern that insufficient attention had been paid to possible inconsistencies between the statutes. See *id.*, at 7217 (statement of Sen. Clark); *id.*, at 13647 (statement of Sen. Bennett). In an attempt to rectify the problem, Senator Bennett proposed his amendment. *Id.*, at 13310. The Senate leadership approved the proposal as a "technical amendment" to the Civil Rights bill, and it was taken up on the floor on June 12, 1964, after cloture had been invoked. The Amendment engendered no controversy, and passed without recorded vote. The entire discussion comprised a few short statements:

> "Mr. BENNETT. Mr. President, after many years of yearning by members of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.
>
> "By this time, programs have been established for the effective administration of this act. Now, when the civil rights bill is under consideration, in which the word 'sex' has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act.
>
> "The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.
>
> "I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill. If they will confirm that understand [*sic*], I shall ask that the amendment be voted on without asking for the yeas and nays.

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amended by the Bennett Amendment. The memorandum obviously has no bearing on the meaning of the terms of the Bennett Amendment itself.

"Mr. HUMPHREY. The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.

"Mr. DIRKSEN. Mr. President, I yield myself 1 minute.

"We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions.

"All that the pending amendment does is recognize those exceptions, that are carried in the basic act.

"Therefore, this amendment is necessary, in the interest of clarification." *Id.*, at 13647.

As this discussion shows, Senator Bennett proposed the Amendment because of a general concern that insufficient attention had been paid to the relation between the Equal Pay Act and Title VII, rather than because of a *specific* potential conflict between the statutes.[13] His explanation that the Amendment assured that the provisions of the Equal Pay Act "shall not be nullified" in the event of conflict with Title VII may be read as referring to the affirmative defenses of the Act. Indeed, his emphasis on the "technical" nature of the Amendment and his concern for not disrupting the "ef-

[13] The dissent finds it "obvious" that the "principal way" the Equal Pay Act might have been "nullified" by enactment of Title VII is that the "equal pay for equal work standard" would not apply under Title VII. *Post*, at 193. There is, however, no support for this conclusion in the legislative history: not one Senator or Congressman discussing the Bennett Amendment during the debates over Title VII so much as mentioned the "equal pay for equal work" standard. Rather, Senator Bennett's expressed concern was for preserving the "programs" that had "been established for the effective administration" of the Equal Pay Act. 110 Cong. Rec. 13647 (1964). This suggests that the focus of congressional concern was on administrative interpretation and enforcement procedures, rather than on the "equal work" limitation.

fective administration" of the Equal Pay Act are more compatible with an interpretation of the Amendment as incorporating the Act's affirmative defenses, as administratively interpreted, than as engrafting all the restrictive features of the Equal Pay Act onto Title VII.[14]

Senator Dirksen's comment that all that the Bennett Amendment does is to "recognize" the exceptions carried in the Fair Labor Standards Act, suggests that the Bennett Amendment was necessary because of the exceptions to coverage in the Fair Labor Standards Act, which made the Equal Pay Act applicable to a narrower class of employers than was Title VII. See *supra*, at 167–168. The Bennett Amendment clarified that the standards of the Equal Pay Act would govern even those wage discrimination cases where only Title VII would otherwise apply. So understood, Senator Dirksen's remarks are not inconsistent with our interpretation.[15]

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[14] The argument in the dissent that under our interpretation, the Equal Pay Act would be impliedly repealed and rendered a nullity, *post*, at 193, is mistaken. Not only might the substantive provisions of the Equal Pay Act's affirmative defenses affect the outcome of some Title VII sex-based wage discrimination cases, see *supra*, at 170–171, but the procedural characteristics of the Equal Pay Act also remain significant. For example, the statute of limitations for backpay relief is more generous under the Equal Pay Act than under Title VII, and the Equal Pay Act, unlike Title VII, has no requirement of filing administrative complaints and awaiting administrative conciliation efforts. Given these advantages, many plaintiffs will prefer to sue under the Equal Pay Act rather than Title VII. See B. Babcock, A. Freedman, E. Norton, & S. Ross, Sex Discrimination and the Law 507 (1975).

[15] In an exchange during the debate on Title VII, Senator Randolph asked Senator Humphrey whether certain differences in treatment in industrial retirement plans, including earlier retirement options for women, would be permissible. Senator Humphrey responded: "Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett amendment; so there can be no doubt about it." 110 Cong. Rec. 13663–13664 (1964). Apparently, Senator Humphrey believed that the discriminatory provisions to which Senator Randolph referred were authorized by the Equal Pay Act. His answer does not reveal whether he

Although there was no debate on the Bennett Amendment in the House of Representatives when the Senate version of the Act returned for final approval, Representative Celler explained each of the Senate's amendments immediately prior to the vote. He stated that the Bennett Amendment "[p]rovides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex . . . ." 110 Cong. Rec. 15896 (1964). If taken literally, this explanation would restrict Title VII's coverage of sex discrimination more severely than even petitioners suggest: not only would it confine *wage discrimination* claims to those actionable under the Equal Pay Act, but it would block *all other* sex discrimination claims as well. We can only conclude that Representative Celler's explanation was not intended to be precise, and does not provide a solution to the present problem.[16]

Thus, although the few references by Members of Congress to the Bennett Amendment do not explicitly confirm that its purpose was to incorporate into Title VII the four affirmative defenses of the Equal Pay Act in sex-based wage discrimination cases, they are broadly consistent with such a reading, and do not support an alternative reading.

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believed such plans to fall within one of the affirmative defenses of the Act, or whether they simply did not violate the Act.

[16] The parties also direct our attention to several comments by Members and Committees of Congress made after passage of Title VII. See 111 Cong. Rec. 13359 (1965) (statement by Senator Bennett that "compensation on account of sex does not violate title VII unless it also violates the Equal Pay Act"); *id.*, at 18263 (statement by Senator Clark criticizing Senator Bennett's attempt to create *post hoc* legislative history and adding his own interpretation); S. Rep. No. 95-331, p. 7 (1977) (stating that the Bennett Amendment authorizes only those practices within the four affirmative defenses of the Equal Pay Act).

We are normally hesitant to attach much weight to comments made after the passage of legislation. See *Teamsters* v. *United States*, 431 U. S. 324, 354, n. 39 (1977). In view of the contradictory nature of these cited statements, we give them no weight at all.

C

The interpretations of the Bennett Amendment by the agency entrusted with administration of Title VII—the Equal Employment Opportunity Commission—do not provide much guidance in this case. Cf. *Griggs* v. *Duke Power Co.*, 401 U. S., at 433–434. The Commission's 1965 Guidelines on Discrimination Because of Sex stated that "the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII." 29 CFR § 1604.7 (a) (1966). In 1972, the EEOC deleted this portion of the Guideline, see 37 Fed. Reg. 6837 (1972). Although the original Guideline may be read to support petitioners' argument that no claim of sex discrimination in compensation may be brought under Title VII except where the Equal Pay Act's "equal work" standard is met, EEOC practice under this Guideline was considerably less than steadfast.

The restrictive interpretation suggested by the 1965 Guideline was followed in several opinion letters in the following years.[17] During the same period, however, EEOC decisions frequently adopted the opposite position. For example, a reasonable-cause determination issued by the Commission in 1968 stated that "the existence of separate and different wage rate schedules for male employees on the one hand, and female employees on the other doing reasonably comparable work, establishes discriminatory wage rates based solely on the sex of the workers." *Harrington* v. *Picadilly Cafeteria*, Case No. AU 7–3–173 (Apr. 25, 1968).[18]

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[17] See General Counsel's opinion of December 29, 1965, App. to Brief for Petitioners 7a; General Counsel's opinion of May 4, 1966, *id.*, at 11a–13a; Commissioner's opinion of July 23, 1966, *id.*, at 16a, BNA Daily Labor Report No. 171, pp. A–3 to A–4 (Sept. 1, 1966); Acting General Counsel's Memorandum of June 6, 1967, App. to Brief for Petitioners 21a–22a.

[18] See also Dec. No. 6–6–5762, CCH EEOC Decisions (1973) ¶ 6001,

The current Guideline does not purport to explain whether the equal work standard of the Equal Pay Act has any application to Title VII, see 29 CFR § 1604.8 (1980), but the EEOC now supports respondents' position in its capacity as *amicus curiae*. In light of this history, we feel no hesitation in adopting what seems to us the most persuasive interpretation of the Amendment, in lieu of that once espoused, but not consistently followed, by the Commission.

D

Our interpretation of the Bennett Amendment draws additional support from the remedial purposes of Title VII and the Equal Pay Act. Section 703 (a) of Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or *otherwise to discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment" because of such individual's sex. 42 U. S. C. § 2000e–2 (a) (emphasis added). As Congress itself has indicated, a "broad approach" to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination. S. Rep. No. 867, 88th Cong., 2d Sess., 12 (1964). We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate.

Under petitioners' reading of the Bennett Amendment, only those sex-based wage discrimination claims that satisfy the "equal work" standard of the Equal Pay Act could be brought under Title VII. In practical terms, this means that a woman who is discriminatorily underpaid could obtain no relief—no matter how egregious the discrimination might be—unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay. Thus, if

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pp. 4008–4009, n. 22 (1968); Dec. No. 71–2629, CCH EEOC Decisions (1973) ¶ 6300, pp. 4538–4539 (1971).

an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male, the woman would be unable to obtain legal redress under petitioners' interpretation. Similarly, if an employer used a transparently sex-biased system for wage determination, women holding jobs not equal to those held by men would be denied the right to prove that the system is a pretext for discrimination. Moreover, to cite an example arising from a recent case, *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702 (1978), if the employer required its female workers to pay more into its pension program than male workers were required to pay, the only women who could bring a Title VII action under petitioners' interpretation would be those who could establish that a man performed equal work: a female auditor thus might have a cause of action while a female secretary might not. Congress surely did not intend the Bennett Amendment to insulate such blatantly discriminatory practices from judicial redress under Title VII.[19]

Moreover, petitioners' interpretation would have other far-reaching consequences. Since it rests on the proposition that any wage differentials not prohibited by the Equal Pay Act are "authorized" by it, petitioners' interpretation would lead to the conclusion that discriminatory compensation by employers not covered by the Fair Labor Standards Act is "authorized"—since not prohibited—by the Equal Pay Act. Thus it would deny Title VII protection against sex-based wage discrimination by those employers not subject to the Fair Labor Standards Act but covered by Title VII. See *supra*, at 167–168. There is no persuasive evidence that Con-

[19] The dissent attempts to minimize the significance of the Title VII remedy in these cases on the ground that the Equal Pay Act already provides an action for sex-based wage discrimination by women who hold jobs not *currently* held by men. *Post*, at 201–202. But the dissent's position would still leave remediless all victims of discrimination who hold jobs *never* held by men.

gress intended such a result, and the EEOC has rejected it since at least 1965. See 29 CFR § 1604.7 (1966). Indeed, petitioners themselves apparently acknowledge that Congress intended Title VII's broader coverage to apply to equal pay claims under Title VII, thus impliedly admitting the fallacy in their own argument. Brief for Petitioners 48.

Petitioners' reading is thus flatly inconsistent with our past interpretations of Title VII as "prohibit[ing] all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 763 (1976). As we said in *Los Angeles Dept. of Water & Power* v. *Manhart*, *supra*, at 707, n. 13: "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes." (Emphasis added.) We must therefore reject petitioners' interpretation of the Bennett Amendment.

III

Petitioners argue strenuously that the approach of the Court of Appeals places "the pay structure of virtually every employer and the entire economy . . . at risk and subject to scrutiny by the federal courts." Brief for Petitioners 99–100. They raise the specter that "Title VII plaintiffs could draw any type of comparison imaginable concerning job duties and pay between any job predominantly performed by women and any job predominantly performed by men." *Id.*, at 101. But whatever the merit of petitioners' arguments in other contexts, they are inapplicable here, for claims based on the type of job comparisons petitioners describe are manifestly different from respondents' claim. Respondents contend that the County of Washington evaluated the worth of their jobs; that the county determined that they should be paid approximately 95% as much as the male correctional officers; that it paid them only about 70% as much, while paying the male

officers the full evaluated worth of their jobs; and that the failure of the county to pay respondents the full evaluated worth of their jobs can be proved to be attributable to intentional sex discrimination. Thus, respondents' suit does not require a court to make its own subjective assessment of the value of the male and female guard jobs, or to attempt by statistical technique or other method to quantify the effect of sex discrimination on the wage rates.[20]

We do not decide in this case the precise contours of lawsuits challenging sex discrimination in compensation under Title VII. It is sufficient to note that respondents' claims of discriminatory undercompensation are not barred by § 703 (h) of Title VII merely because respondents do not perform work equal to that of male jail guards. The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE STEWART, and JUSTICE POWELL join, dissenting.

The Court today holds a plaintiff may state a claim of sex-based wage discrimination under Title VII without even establishing that she has performed "equal or substantially equal work" to that of males as defined in the Equal Pay Act. Because I believe that the legislative history of both the Equal Pay Act of 1963 and Title VII clearly establish that there can be no Title VII claim of sex-based wage discrimination without proof of "equal work," I dissent.

I

Because the Court never comes to grips with petitioners' argument, it is necessary to restate it here. Petitioners argue

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[20] See Treiman, *supra* n. 6, at 35–36 (interim report to the EEOC); Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702, 721–725 (1980); Nelson, Opton, & Wilson, *supra* n. 6, at 278–288; Schwab, Job Evaluation and Pay Setting: Concepts and Practices, in Livernash, *supra* n. 6, at 49, 52–70.

that Congress in adopting the Equal Pay Act specifically addressed the problem of sex-based wage discrimination and determined that there should be a remedy for claims of unequal pay for equal work, but not for "comparable" work. Petitioners further observe that nothing in the legislative history of Title VII, enacted just one year later in 1964, reveals an intent to overrule that determination. Quite the contrary, petitioners note that the legislative history of Title VII, including the adoption of the so-called Bennett Amendment, demonstrates Congress' intent to require all sex-based wage discrimination claims, whether brought under the Equal Pay Act or under Title VII, to satisfy the "equal work" standard. Because respondents have not satisfied the "equal work" standard, petitioners conclude that they have not stated a claim under Title VII.

In rejecting that argument, the Court ignores traditional canons of statutory construction and relevant legislative history. Although I had thought it well settled that the legislative history of a statute is a useful guide to the intent of Congress, the Court today claims that the legislative history "has no bearing on the meaning of the [Act]," *ante*, at 173, n. 12, "does not provide a solution to the present problem," *ante*, at 176, and is simply of "no weight." *Ante*, at 176, n. 16. Instead, the Court rests its decision on its unshakable belief that any other result would be unsound public policy. It insists that there simply *must* be a remedy for wage discrimination *beyond* that provided in the Equal Pay Act. The Court does not explain *why* that must be so, nor does it explain *what* that remedy might be. And, of course, the Court cannot explain why it and not Congress is charged with determining what is and what is not sound public policy.

The closest the Court can come in giving a reason for its decision is its belief that interpretations of Title VII which "deprive victims of discrimination of a remedy, without clear congressional mandate" must be avoided. *Ante*, at 178. But that analysis turns traditional canons of statutory construc-

tion on their head. It has long been the rule that when a legislature enacts a statute to protect a class of persons, the burden is on the plaintiff to show statutory coverage, not on the defendant to show that there is a "clear congressional mandate" for *excluding* the plaintiff from coverage. Such a departure from traditional rules is particularly unwarranted in this case, where the doctrine of *in pari materia* suggests that all claims of sex-based wage discrimination are governed by the substantive standards of the previously enacted and more specific legislation, the Equal Pay Act.

Because the decision does not rest on any reasoned statement of logic or principle, it provides little guidance to employers or lower courts as to what types of compensation practices might now violate Title VII. The Court correctly emphasizes that its decision is narrow, and indeed one searches the Court's opinion in vain for a hint as to what pleadings or proof other than that adduced in this particular case, see *ante*, at 180–181, would be sufficient to state a claim of sex-based wage discrimination under Title VII. To paraphrase Justice Jackson, the Court today does not and apparently cannot enunciate any legal criteria by which suits under Title VII will be adjudicated and it lays "down no rule other than our passing impression to guide ourselves or our successors." *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28, 45 (1948). All we know is that Title VII provides a remedy when, as here, plaintiffs seek to show by *direct* evidence that their employer *intentionally* depressed their wages. And, for reasons that go largely unexplained, we also know that a Title VII remedy may not be available to plaintiffs who allege theories different than that alleged here, such as the so-called "comparable worth" theory. One has the sense that the decision today will be treated like a restricted railroad ticket, "good for this day and train only." *Smith* v. *Allwright*, 321 U. S. 649, 669 (1944) (Roberts, J., dissenting).

In the end, however, the flaw with today's decision is not so much that it is so narrowly written as to be virtually

meaningless, but rather that its legal analysis is wrong. The Court is obviously more interested in the consequences of its decision than in discerning the intention of Congress. In reaching its desired result, the Court conveniently and persistently ignores relevant legislative history and instead relies wholly on what it believes Congress *should* have enacted.

II

The Equal Pay Act

The starting point for any discussion of sex-based wage discrimination claims must be the Equal Pay Act of 1963, enacted as an amendment to the Fair Labor Standards Act of 1938, 29 U. S. C. §§ 201–219 (1976 ed., Supp. III). It was there that Congress, after 18 months of careful and exhaustive study, specifically addressed the problem of sex-based wage discrimination. The Equal Pay Act states that employers shall not discriminate on the basis of sex by paying different wages for jobs that require equal skill, effort, and responsibility. In adopting the "equal pay for equal work" formula, Congress carefully considered and ultimately rejected the "equal pay for comparable worth" standard advanced by respondents and several *amici*. As the legislative history of the Equal Pay Act amply demonstrates, Congress realized that the adoption of the comparable-worth doctrine would ignore the economic realities of supply and demand and would involve both governmental agencies and courts in the impossible task of ascertaining the worth of comparable work, an area in which they have little expertise.

The legislative history of the Equal Pay Act begins in 1962 when Representatives Green and Zelenko introduced two identical bills, H. R. 8898 and H. R. 10226 respectively, representing the Kennedy administration's proposal for equal pay legislation. Both bills stated in pertinent part:

> "SEC. 4. No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to

> any employee at a rate less than the rate at which he pays wages to any employee of the opposite sex *for work of comparable character on jobs the performance of which requires comparable skills,* except where such payment is made pursuant to a seniority or merit increase system which does not discriminate on the basis of sex." H. R. 8898, 87th Cong., 1st Sess. (1961); H. R. 10226, 87th Cong., 2d Sess. (1962) (emphasis supplied).[1]

During the extensive hearings on the proposal, the administration strenuously urged that Congress adopt the "comparable" language, noting that the comparability of different jobs could be determined through job evaluation procedures. Hearings on H. R. 8898, H. R. 10226 before the Select Subcommittee on Labor of the House Committee on Education and Labor, 87th Cong., 2d Sess., 16, 27 (1962) (testimony of Secretary of Labor Arthur Goldberg and Assistant Secretary of Labor Esther Peterson). A bill containing the comparable-work formula, then denominated H. R. 11677, was reported out of the House Committee on Education and Labor and reached the full House. Once there, Representative St. George objected to the "comparable work" language of the bill and offered an amendment which limited equal pay claims to those "for equal work on jobs, the performance of which requires equal skills." 108 Cong. Rec. 14767 (1962). As she explained, her purpose was to limit wage discrimination claims

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[1] Comparable work was not a new idea. During World War II the regulations of the National War Labor Board (NWLB) required equal pay for "comparable work." Under these regulations, the Board made job evaluations to determine whether pay inequities existed within a plant between dissimilar jobs. See *General Electric Co.*, 28 War Lab. Rep. 666 (1945). As a result, in every Congress since 1945, bills had been introduced mandating equal pay for "comparable work." In substituting the term "equal work" for "comparable work," Congress clearly rejected the approach taken by the NWLB.

to the situation where men and women were paid differently for performing the same job.

> "What we want to do in this bill is to make it exactly what it says. It is called equal pay for equal work in some of the committee hearings. *There is a great difference between the word 'comparable' and the word 'equal.'*
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> . . . . .
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> ". . . *The word 'comparable' opens up great vistas.* It gives tremendous latitude to whoever is to be arbitrator in these disputes." *Ibid.* (Emphasis supplied.)

Representative Landrum echoed those remarks. He stressed that the St. George amendment would prevent "the trooping around all over the country of employees of the Labor Department harassing business with their various interpretations of the term 'comparable' when 'equal' is capable of the same definition throughout the United States." *Id.*, at 14768. The administration, represented by Representatives Zelenko and Green, vigorously urged the House to reject the St. George amendment. They observed that the "equal work" standard was narrower than the existing "equal pay for comparable work" language and cited correspondence from Secretary of Labor Goldberg that "comparable is a key word in our proposal." *Id.*, at 14768–14769. The House, however, rejected that advice and adopted the St. George amendment. When the Senate considered the bill, it too rejected the "comparable work" theory in favor of the "equal work" standard.

Because the Conference Committee failed to report a bill out of Committee, enactment of equal pay legislation was delayed until 1963. Equal pay legislation, containing the St. George amendment, was reintroduced at the beginning of the session. The congressional debate on that legislation leaves no doubt that Congress clearly rejected the entire notion of "comparable worth." For example, Representative

Goodell, a cosponsor of the Act, stressed the significance of the change from "comparable work" to "equal work."[2]

> "I think it is important that we have clear legislative history at this point. *Last year when the House changed the word 'comparable' to 'equal' the clear intention was to narrow the whole concept.* We went from 'comparable' to 'equal' meaning that the jobs involved should be virtually identical, that is, that they would be very much alike or closely related to each other.
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> "We do not expect the Labor Department to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, 'Well, they amount to the same thing,' and evaluate them so that they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal." 109 Cong. Rec. 9197 (1963) (emphasis supplied).

Representative Frelinghuysen agreed with those remarks.

> "[W]e can expect that the administration of the equal pay concept, while fair and effective, will not be excessive nor excessively wide ranging. What we seek to insure, where men and women are doing the same job under the same working conditions[,] that they will receive the same pay. It is not intended that either the Labor Department or individual employees will be equipped with hunting licenses.
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> . . . . . .
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> " . . . [*The EPA*] *is not intended to compare unrelated jobs, or jobs that have been historically and normally considered by the industry to be different.*" *Id.*, at 9196 (emphasis supplied).[3]

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[2] Statements made by the sponsors of legislation "deserv[e] to be accorded substantial weight in interpreting the statute." *FEA* v. *Algonquin SNG, Inc.*, 426 U. S. 548, 564 (1976); *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394 (1951).

[3] Representative Goodell rejected any type of wage comparisons between

Thus, the legislative history of the Equal Pay Act clearly reveals that Congress was unwilling to give either the Federal Government or the courts broad authority to determine comparable wage rates. Congress recognized that the adoption of such a theory would ignore economic realities and would result in major restructuring of the American economy. Instead, Congress concluded that governmental intervention to equalize wage differentials was to be undertaken only within one circumstance: when men's and women's jobs were identical or nearly so, hence unarguably of equal worth. It defies common sense to believe that the same Congress—which, after 18 months of hearings and debates, had decided in 1963 upon the extent of federal involvement it desired in the area of wage rate claims—intended *sub silentio* to reject all of this work and to abandon the limitations of the equal work approach just one year later, when it enacted Title VII.

Title VII

Congress enacted the Civil Rights Act of 1964, 42 U. S. C. § 2000a *et seq.*, one year after passing the Equal Pay Act. Title VII prohibits discrimination in employment on the basis of race, color, national origin, religion, and sex. 42 U. S. C. § 2000e–2 (a)(1). The question is whether Congress intended to completely turn its back on the "equal work" standard enacted in the Equal Pay Act of 1963 when it adopted Title VII only one year later.

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men and women as the basis for relief. He stated: "We do not have in mind the Secretary of Labor's going into an establishment and saying, 'Look you are paying the women here $1.75 and the men $2.10. Come on in here, Mr. Employer, and you prove that you are not discriminating on the basis of sex.' That would be just the opposite of what we are doing." 109 Cong. Rec. 9208 (1963). Similarly, Representative Griffin noted that the "equal work" standard meant that the jobs of inspector and assembler could not be compared, nor could inspectors who inspect complicated parts be compared to inspectors making simple cursory inspections. *Id.*, at 9197. Representative Thompson, one of the original sponsors of the equal pay legislation, agreed with Representative Griffin's examples. *Id.*, at 9198.

The Court answers that question in the affirmative, concluding that Title VII must be read more broadly than the Equal Pay Act. In so holding, the majority wholly ignores this Court's repeated adherence to the doctrine of *in pari materia*, namely, that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 153 (1976), citing *Morton* v. *Mancari*, 417 U. S. 535, 550–551 (1974); *United States* v. *United Continental Tuna Corp.*, 425 U. S. 164, 169 (1976). In *Continental Tuna*, for example, the lower court held that an amendment to the Suits in Admiralty Act allowed plaintiffs to sue the United States under that Act and ignore the applicable and more stringent provisions of the previously enacted Public Vessels Act. We rejected that construction because it amounted to a repeal of the Public Vessels Act by implication. We recognized that such an evasion of the congressional purpose reflected in the restrictive provisions would not be permitted absent some clear statement by Congress that such was intended by the later statute. Similarly, in *Train* v. *Colorado Public Interest Research Group*, 426 U. S. 1 (1976), this Court rejected a construction of the Federal Water Control Act which would have substantially altered the regulation scheme established under the Atomic Energy Act, without a "clear indication of legislative intent." *Id.*, at 24.

When those principles are applied to this case, there can be no doubt that the Equal Pay Act and Title VII should be construed *in pari materia*. The Equal Pay Act is the more specific piece of legislation, dealing solely with sex-based wage discrimination, and was the product of exhaustive congressional study. Title VII, by contrast, is a general antidiscrimination provision, passed with virtually no consideration of the specific problem of sex-based wage discrimination. See *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 143 (1976) (the legislative history of the sex discrimination amendment

is "notable primarily for its brevity").[4] Most significantly, there is absolutely nothing in the legislative history of Title VII which reveals an intent by Congress to repeal by implication the provisions of the Equal Pay Act. Quite the contrary, what little legislative history there is on the subject—such as the comments of Senators Clark and Bennett and Representative Celler, and the contemporaneous interpretation of the EEOC—indicates that Congress intended to incorporate the substantive standards of the Equal Pay Act into Title VII so that sex-based wage discrimination claims would be governed by the equal work standard of the Equal Pay Act and by that standard alone. See discussion *infra*, at 190–197.

In order to the reach the result it so desperately desires, the Court neatly solves the problem of this contrary legislative history by simply giving it "no weight." *Ante*, at 172, n. 12, 176, and n. 16. But it cannot be doubted that Chief Justice Marshall stated the correct rule that "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . . ." *United States* v. *Fisher*, 2 Cranch 358, 386 (1805). In this case, when all of the pieces of legislative history are considered *in toto*, the Court's version of the legislative history of Title VII is barely plausible, say nothing of convincing.

Title VII was first considered by the House, where the prohibition against sex discrimination was added on the House floor. When the bill reached the Senate it bypassed the

[4] Indeed, Title VII was originally intended to protect the rights of Negroes. On the final day of consideration by the entire House, Representative Smith added an amendment to prohibit sex discrimination. It has been speculated that the amendment was added as an attempt to thwart passage of Title VII. The amendment was passed by the House that same day, and the entire bill was approved two days later and sent to the Senate without any consideration of the effect of the amendment on the Equal Pay Act. The attenuated history of the sex amendment to Title VII makes it difficult to believe that Congress thereby intended to wholly abandon the carefully crafted equal work standard of the Equal Pay Act.

Senate Committee system and was presented directly to the full Senate. It was there that concern was expressed about the relation of the Title VII sex discrimination ban to the Equal Pay Act. In response to questions by Senator Dirksen, Senator Clark, the floor manager for the bill, prepared a memorandum in which he attempted to put to rest certain objections which he believed to be unfounded. Senator Clark's answer to Senator Dirksen reveals that Senator Clark believed that all cases of wage discrimination under Title VII would be treated under the standards of the Equal Pay Act:

> "*Objection.* The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. *They do not include the limitations in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.*
>
> "*Answer.* The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike title VII. Furthermore, under title VII, jobs can no longer be classified as to sex, except where there is a rational basis for discrimination on the ground of bona fide occupational qualification. *The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII.*" 110 Cong. Rec. 7217 (1964) (emphasis added).

In this passage, Senator Clark asserted that the sex discrimination provisions of Title VII were necessary, notwithstanding the Equal Pay Act, because (a) the Equal Pay Act had numerous exemptions for various types of businesses, and (b) Title VII covered discrimination in access (*e. g.*, assignment and promotion) to jobs, not just compensation. In addition, Senator Clark made clear that in the compensation area the equal work standard would continue to be the ap-

plicable standard. He explained, in answer to Senator Dirksen's concern, that when *different jobs* were at issue, the Equal Pay Act's legal standard—the "equal work" standard—would apply to limit the reach of Title VII. Thus Senator Clark rejected as unfounded the objections that the sex provisions of Title VII were unnecessary on the one hand or extended beyond the equal work standard on the other.

Notwithstanding Senator Clark's explanation, Senator Bennett remained concerned that, absent an explicit cross-reference to the Equal Pay Act, the "wholesale insertion" of the word "sex" in Title VII could nullify the carefully conceived Equal Pay Act standard. 110 Cong. Rec. 13647 (1964). Accordingly, he offered, and the Senate accepted, the following amendment to Title VII:

> "It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [§ 6 (d) of the Equal Pay Act]."

Although the language of the Bennett Amendment is ambiguous, the most plausible interpretation of the Amendment is that it incorporates the substantive standard of the Equal Pay Act—the equal pay for equal work standard—into Title VII. A number of considerations support that view. In the first place, that interpretation is wholly consistent with, and in fact confirms, Senator Clark's earlier explanation of Title VII. Second, in the limited time available to Senator Bennett when he offered his amendment—the time for debate having been limited by cloture—he explained the Amendment's purpose.[5]

"Mr. President, after many years of yearning by mem-

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[5] The Court makes far too much of the fact that Senator Bennett's Amendment was designated a "technical amendment." It is apparently

bers of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.

"By this time, programs have been established for the effective administration of this act. Now when the civil rights bill is under consideration, in which the word 'sex' has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act.

"The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified." 110 Cong. Rec. 13647 (1964) (emphasis supplied).

It is obvious that the principal way in which the Equal Pay Act could be "nullified" would be to allow plaintiffs unable to meet the "equal pay for equal work" standard to proceed under Title VII asserting some other theory of wage discrimination, such as "comparable worth." If plaintiffs can proceed under Title VII without showing that they satisfy the "equal work" criterion of the Equal Pay Act, one would expect all plaintiffs to file suit under the "broader" Title VII standard. Such a result would, for all practical purposes, constitute an implied repeal of the equal work standard of the Equal Pay Act and render that Act a nullity. This was precisely the result Congress sought to avert when it adopted the Bennett Amendment, and the result the Court today embraces.

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the Court's belief that a "technical amendment" is an insignificant one. The Amendment, however, was so designated simply because (1) the Amendment confirmed the general intention of the Senate evinced by Senator Clark's earlier explanation of Title VII, and (2) the time for debate had been limited by the invocation of cloture, leaving a "technical amendment" as the most expeditious way of introducing an amendment. Senator Bennett later explained all of this. 111 Cong. Rec. 13359 (1965).

Senator Bennett confirmed this interpretation just one year later. The Senator expressed concern as to the proper interpretation of his Amendment and offered his written understanding of the Amendment.

> "The Amendment therefore means that it is not an unlawful employment practice: . . . (b) to have different standards of compensation for nonexempt employees, where such differentiation is not prohibited by the equal pay amendment to the Fair Labor Standards Act.
>
> "Simply stated, *the* [*Bennett*] *amendment means that discrimination in compensation on account of sex does not violate title VII unless it also violates the Equal Pay Act.*" 111 Cong. Rec. 13359 (1965) (emphasis supplied).

Senator Dirksen agreed that this interpretation was "precisely" the one that he, Senator Humphrey, and their staffs had in mind when the Senate adopted the Bennett Amendment. *Id.*, at 13360. He added: "I trust that that will suffice to clear up in the minds of anyone, whether in the Department of Justice or elsewhere, what the Senate intended when that amendment was accepted." *Ibid.*[6]

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[6] There is undoubtedly some danger in relying on subsequent legislative history. But that does not mean that such subsequent legislative history is wholly irrelevant, particularly where, as here, the *sponsor* of the legislation makes a clarifying statement which is not inconsistent with the prior ambiguous legislative history. See *Galvan* v. *Press*, 347 U. S. 522, 526–527 (1954) (Court relied on a 1951 memorandum by Senator McCarran in interpreting the meaning of a 1950 statute he sponsored).

The Court suggests Senator Bennett's 1965 comments should be discounted because Senator Clark criticized them. *Ante*, at 176, n. 16. Senator Clark did indeed criticize Senator Bennett, but only because Senator Clark read Senator Bennett's explanation as suggesting that Title VII protection would not be available to those employees not within the Equal Pay Act's coverage. Senator Clark's view was that employees not covered by the Equal Pay Act could still bring Title VII claims. He did not dispute, however, the proposition that the "equal work" standard of the Equal Pay Act was incorporated into Title VII claims. Quite the con-

We can glean further insight into the proper interpretation of the Bennett Amendment from the comments of Representative Celler, the Chairman of the House Judiciary Committee and sponsor of Title VII. After the Senate added the Bennett Amendment to Title VII and sent the bill to the House, Representative Celler set out in the record the understanding of the House that sex-based compensation claims would not satisfy Title VII unless they met the equal work standards of the Equal Pay Act. He explained that the Bennett Amendment "[p]rovides that compliance with the [EPA] satisfies the requirement of the title barring discrimination because of sex—[§ 703 (h)]." 110 Cong. Rec. 15896 (1964). The majority discounts this statement because it is somewhat "imprecise." *Ante*, at 176. I find it difficult to believe that a comment to the full House made by the sponsor of Title VII, who obviously understood its provisions, including its amendments, is of no aid whatsoever to the inquiry before us.[7]

Finally, the contemporaneous interpretations of the Bennett Amendment by the EEOC, which are entitled to great

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trary, Senator Clark placed into the record a letter from the Chairman of the National Committee for Equal Pay which stated:

"Our best understanding of the implications of the [Bennett Amendment] at the time it was adopted was that its intent and effect was to make sure that equal pay would be applied and interpreted under the Civil Rights Act in the same way as under the earlier statute, the Equal Pay Act. *That is, the Equal Pay Act standards requiring equal work . . . would also be applied under the Civil Rights Act.*" 111 Cong. Rec. 18263 (1965) (emphasis supplied).

Senator Clark then commended to the EEOC the reasoning set forth in the letter. *Ibid.*

[7] In light of the foregoing, the Court's statement that no Senator or Congressman mentioned the "equal work" standard is mystifying. *Ante*, at 174, n. 13. Senator Clark, for example, discussed it twice. See *supra*, at 191–192; n. 6, *supra*. Indeed, it is the Court's theory—that only the affirmative defenses are incorporated into Title VII—that is not "so much as mentioned" by any "Senator or Congressman." See *infra*, at 198–199.

weight since they were issued while the intent of Congress was still fresh in the administrator's mind, further buttresses petitioners' interpretation of the Amendment. *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965); *General Electric Co.* v. *Gilbert*, 429 U. S., at 142. The EEOC interpretations clearly state that the Equal Pay Act's equal work standard is incorporated into Title VII as the standard which must be met by plaintiffs alleging sex-based compensation claims under Title VII. The Commission's 1965 Guidelines on Discrimination Because of Sex explain:

> "Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6 (d) of the Fair Labor Standards Act of 1938, 29 U. S. C. § 206 (d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. *Accordingly, the Commission interprets section 703 (h) to mean that the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII.* However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is coextensive with that of the other prohibitions in section 703, and is not limited by § 703 (h) to those employees covered by the Fair Labor Standards Act." 29 CFR § 1604.7 (1966). (Emphasis supplied.)

Three weeks after the EEOC issued its Guidelines, the General Counsel explained the Guidelines in an official opinion letter.[8] He explained:

> "The Commission, as indicated in § 1604.7 of the

[8] Other opinion letters issued by the EEOC General Counsel during the 1960's confirmed that Title VII would not be violated unless equal work was performed. The General Counsel's opinion of May 4, 1966, explains:

"It follows that an employer covered by Title VII may not pay a male less than the California minimum wage while paying the statutory rate

> Guidelines issued November 24, 1965, 30 F. R. 14928, has decided that section 703 (h), Title VII of the Civil Rights Act of 1964 *incorporates the definition of discrimination in compensation found in the Equal Pay Act, including the four enumerated exceptions . . . .*" General Counsel's opinion of December 29, 1965, App. to Brief for Petitioners 7a. (Emphasis supplied.)

Thus EEOC's contemporaneous interpretation of the Bennett Amendment leaves no room for doubt: The Bennett Amendment incorporates the equal work standard of discrimination into Title VII.[9]

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to a woman for the same job. . . . [*W*]*hatever the general rule may be under Title VII, the Bennett Amendment compels us to apply the same test for differences in compensation based on sex.* 29 CFR 1604.7." App. to Brief for Petitioners 11a–13a.

The General Counsel's opinion of February 28, 1966, stresses that "where an employer pays a certain wage to employees of one sex in order to comply with such a law, he must also pay the same rate to employees of the opposite sex for equal work [under Title VII]." *Id.*, at 9a–10a. The Commissioner's opinion of July 23, 1966, states that "[a]ssuming that male and female laborers perform the same functions . . . a wage differential would violate [Title VII]." *Id.*, at 16a.

And the Acting General Counsel's Memorandum of June 6, 1967, made clear that the Equal Pay Act's equal work standard, *i. e.*, equal skill, effort, responsibility, and working conditions, as well as the Equal Pay Act's affirmative defenses, *i. e.*, seniority systems, merit systems, etc., were incorporated by the phrase "authorize" in the Bennett Amendment. As he interpreted the word "authorize":

"*Differentiations which are authorized under said section* [*703 (h)*] *are differentiations on the basis of skill, effort, responsibility and working conditions,* and differentiations related to a seniority system, a merit system, a system which measures earnings by quantity or quality of production or a differential based on any other factor than sex.

"It is the interpretation of these provisions that requires harmonization between Title VII and the Equal Pay [Act] because these are the provisions which, within the meaning of § 70[3] (h), 'authorize' differentiations." *Id.*, at 21a–22a. (Emphasis supplied.)

[9] The EEOC has since changed its mind as to the relationship between Title VII and the Equal Pay Act. But this Court has recognized that

The Court blithely ignores all of this legislative history and chooses to interpret the Bennett Amendment as incorporating only the Equal Pay Act's four affirmative defenses, and not the equal work requirement.[10] That argument does not survive scrutiny. In the first place, the language of the Amendment draws no distinction between the Equal Pay Act's standard for liability—equal pay for equal work—and the Act's defenses. Nor does any Senator or Congressman

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"an EEOC guideline is not entitled to great weight where . . . it varies from prior EEOC policy and no new legislative history has been introduced in support of the change". *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 76, n. 11 (1977). See *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 142 (1976) (Court discounted weight to be given to the 1972 Title VII regulations addressing pregnancy benefits because they were inconsistent with the 1965 regulations).

[10] In reaching this conclusion, the Court relies far too heavily on a definition of the word "authorize." Rather than "make a fortress out of the dictionary," *Cabell* v. *Markham*, 148 F. 2d 737, 739 (CA2), aff'd, 326 U. S. 404 (1945), the Court should instead attempt to implement the legislative intent of Congress. Even if dictionary definitions were to be our guide, the word "authorized" has been defined to mean exactly what petitioners contend. Black's Law Dictionary 169 (4th ed. 1968) defines "authorized" to mean "[t]o permit a thing to be done in the future." Accordingly, the language of the Bennett Amendment suggests that those differentiations which are authorized under the Equal Pay Act—and thus Title VII—are those based on "skill, effort, responsibility and working conditions" and those related to the four affirmative defenses. See n. 7, *supra*.

Respondents also rely on Senator Dirksen's brief reference to "exceptions to the basic Act . . . ." That statement is highly ambiguous and is too thin a reed to support their conclusion that Congress intended to incorporate only the Equal Pay Act's affirmative defenses. First, as even the Court concedes, *ante*, at 175, the reference to the "exceptions" probably refers to the exemptions from coverage of the Fair Labor Standards Act, not to the Equal Pay Act's four defenses. Second, it was Senator Dirksen who first raised the objection, answered by Senator Clark, that Title VII would reject the equal work requirement. And third, in 1965 Senator Dirksen explicitly agreed with Senator Bennett's interpretation of the Amendment. See *supra*, at 194. It thus is highly unlikely that Senator Dirksen would have been interested in preserving either the exceptions or the affirmative defenses, but not the "equal work" standard.

even come close to suggesting that the Amendment incorporates the Equal Pay Act's affirmative defenses into Title VII, but not the equal work standard itself. Quite the contrary, the concern was that Title VII would render the Equal Pay Act a nullity. It is only too obvious that reading just the four affirmative defenses of the Equal Pay Act into Title VII does not protect the careful draftsmanship of the Equal Pay Act. We must examine statutory words in a manner that " 'reconstitute[s] the gamut of values current at the time when the words were uttered.' " *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U. S. 612, 620 (1967) (quoting L. Hand, J.). In this case, it stands Congress' concern on its head to suppose that Congress sought to incorporate the affirmative defenses, but not the equal work standard. It would be surprising if Congress in 1964 sought to reverse its decision in 1963 to require a showing of "equal work" as a predicate to an equal pay claim and at the same time carefully preserve the four affirmative defenses.

Moreover, even on its own terms the Court's argument is unpersuasive. The Equal Pay Act contains four statutory defenses: different compensation is permissible if the differential is made by way of (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) is based on any other factor other than sex. 29 U. S. C. § 206 (d)(1). The flaw in interpreting the Bennett Amendment as incorporating only the four defenses of the Equal Pay Act into Title VII is that Title VII, even without the Bennett Amendment, contains those very same defenses.[11] The opening sentence of

[11] Under the Court's analysis, § 703 (h) consists of two redundant sentences:

"[1] Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation . . . pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations . . . . [2] [The Bennett Amendment] It shall not be an unlawful employment

§ 703 (h) protects differentials and compensation based on seniority, merit, or quantity or quality of production. These are three of the four EPA defenses. The fourth EPA defense, "a factor other than sex," is already implicit in Title VII because the statute's prohibition of sex discrimination applies only if there is discrimination on the basis of sex. Under the Court's interpretation, the Bennett Amendment, the second sentence of § 703 (h), is mere surplusage. *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,' *Montclair* v. *Ramsdell*, 107 U. S. 147, 152, rather than emasculate an entire section").[12] The Court's answer to this argument is curious. It suggests that repetition ensures that the provisions would be consistently interpreted by the courts. *Ante*, at 170. But that answer only speaks to the purpose for incorporating the defenses in each statute, not for stating the defenses twice in the same statute. Courts are not quite as dense as the majority assumes.

In sum, Title VII and the Equal Pay Act, read together, provide a balanced approach to resolving sex-based wage discrimination claims. Title VII guarantees that qualified female employees will have access to all jobs, and the Equal Pay Act assures that men and women performing the same work will be paid equally. Congress intended to remedy wage discrimination through the Equal Pay Act standards, whether suit is brought under that statute or under Title

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practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid . . . [except pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex]."

[12] In 1965, Senator Bennett himself made this point. He stressed that "[the language setting out the defenses] is merely clarifying language similar to that which was already in section 703 (h). If the Bennett amendment was simply intended to incorporate by reference these exceptions into subsection (h), the amendment would have no substantive effect." 111 Cong. Rec. 13359 (1965).

VII. What emerges is that Title VII would have been construed *in pari materia* even without the Bennett Amendment, and that the Amendment serves simply to insure that the equal work standard would be the standard by which all wage compensation claims would be judged.

III

Perhaps recognizing that there is virtually no support for its position in the legislative history, the Court rests its holding on its belief that any other holding would be unacceptable public policy. *Ante,* at 178–180. It argues that there must be a remedy for wage discrimination beyond that provided for in the Equal Pay Act. Quite apart from the fact that that is an issue properly left to Congress and not the Court, the Court is wrong even as a policy matter. The Court's parade of horribles that would occur absent a distinct Title VII remedy simply does not support the result it reaches.

First, the Court contends that a separate Title VII remedy is necessary to remedy the situation where an employer admits to a female worker, hired for a unique position, that her compensation would have been higher had she been male. *Ante,* at 178–179. Stated differently, the Court insists that an employer could isolate a predominantly female job category and arbitrarily cut its wages because no men currently perform equal or substantially equal work. But a Title VII remedy is unnecessary in these cases because an Equal Pay Act remedy is available. Under the Equal Pay Act, it is not necessary that every Equal Pay Act violation be established through proof that members of the opposite sex are *currently* performing equal work for greater pay. However unlikely such an admission might be in the bullpen of litigation, an employer's statement that "if my female employees performing a particular job were males, I would pay them more simply because they are males" would be admissible in a suit under that Act. Overt discrimination does not go unremedied by the Equal Pay Act. See *Bourque* v. *Powell Elec-*

trical Manufacturing Co., 617 F. 2d 61 (CA5 1980); *Peltier* v. *City of Fargo*, 533 F. 2d 374 (CA8 1976); *International Union of Electrical Workers* v. *Westinghouse Electric Corp.*, 631 F. 2d 1094, 1108, n. 2 (CA3 1980) (Van Dusen, J., dissenting). In addition, insofar as hiring or placement discrimination caused the isolated job category, Title VII already provides numerous remedies (such as backpay, transfer, and constructive seniority) without resort to job comparisons. In short, if women are limited to low paying jobs against their will, they have adequate remedies under Title VII for denial of job opportunities even under what I believe is the correct construction of the Bennett Amendment.

The Court next contends that absent a Title VII remedy, women who work for employers exempted from coverage of the Equal Pay Act would be wholly without a remedy for wage discrimination. *Ante*, at 179–180. The Court misapprehends petitioners' argument. As Senator Clark explained in his memorandum, see *supra*, at 191–192, Congress sought to incorporate into Title VII the substantive standard of the Equal Pay Act—the "equal work" standard—not the employee coverage provisions. See *supra*, at 194–195, n. 6. Thus, to say that the "equal pay for equal work" standard is incorporated into Title VII does not mean that employees are precluded from bringing compensation discrimination claims under Title VII. It means only that if employees choose to proceed under Title VII, they must show that they have been deprived of "equal pay for equal work."

There is of course a situation in which petitioners' position *would* deny women a remedy for claims of sex-based wage discrimination. A remedy would not be available where a lower paying job held primarily by women is "comparable," but not substantially equal to, a higher paying job performed by men. That is, plaintiffs would be foreclosed from showing that they received unequal pay for work of "comparable worth" or that dissimilar jobs are of "equal worth." The short, and best, answer to that contention is that Congress

in 1963 explicitly chose not to provide a remedy in such cases. And contrary to the suggestion of the Court, it is by no means clear that Title VII was enacted to remedy *all* forms of alleged discrimination. We recently emphasized for example, that "Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that 'management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible.'" *Steelworkers* v. *Weber*, 443 U. S. 193, 206 (1979). See *Mohasco Corp.* v. *Silver*, 447 U. S. 807, 820 (1980) (a 90-day statute of limitations may have "represented a necessary sacrifice of the rights of some victims of discrimination in order that a civil rights bill could be enacted"). Congress balanced the need for a remedy for wage discrimination against its desire to avoid the burdens associated with governmental intervention into wage structures. The Equal Pay Act's "equal pay for equal work" formula reflects the outcome of this legislative balancing. In construing Title VII, therefore, the courts cannot be indifferent to this sort of political compromise.

IV

Even though today's opinion reaches what I believe to be the wrong result, its narrow holding is perhaps its saving feature. The opinion does not endorse the so-called "comparable worth" theory: though the Court does not indicate how a plaintiff might establish a prima facie case under Title VII, the Court does suggest that allegations of unequal pay for unequal, but comparable, work will not state a claim on which relief may be granted. The Court, for example, repeatedly emphasizes that this is not a case where plaintiffs ask the court to compare the value of dissimilar jobs or to quantify the effect of sex discrimination on wage rates. *Ante*, at 166, 180–181. Indeed, the Court relates, without criticism, respondents' contention that *Lemons* v. *City and County of*

Denver, 620 F. 2d 228 (CA10), cert. denied, 449 U. S. 888 (1980), is distinguishable. *Ante*, at 166, n. 7. There the court found that Title VII did not provide a remedy to nurses who sought increased compensation based on a comparison of their jobs to dissimilar jobs of "comparable" value in the community. See also *Christensen* v. *Iowa*, 563 F. 2d 353 (CA8 1977) (no prima facie case under Title VII when plaintiffs, women clerical employees of a university, sought to compare their wages to the employees in the physical plant).

Given that implied repeals of legislation are disfavored, *TVA* v. *Hill*, 437 U. S. 153, 189 (1978), we should not be surprised that the Court disassociates itself from the entire notion of "comparable worth." In enacting the Equal Pay Act in 1963, Congress specifically prohibited the courts from comparing the wage rates of dissimilar jobs: there can only be a comparison of wage rates where jobs are "equal or substantially equal." Because the legislative history of Title VII does not reveal an intent to overrule that determination, the courts should strive to harmonize the intent of Congress in enacting the Equal Pay Act with its intent in enacting Title VII. Where, as here, the policy of prior legislation is clearly expressed, the Court should not "transfuse the successor statute with a gloss of its own choosing." *De Sylva* v. *Ballentine*, 351 U. S. 570, 579 (1956).

Because there are no logical underpinnings to the Court's opinion, all we may conclude is that even absent a showing of equal work, there is a cause of action under Title VII where there is direct evidence that an employer has *intentionally* depressed a woman's salary because she is a woman. The decision today does not approve a cause of action based on a *comparison* of the wage rates of dissimilar jobs.

For the foregoing reasons, however, I believe that even that narrow holding cannot be supported by the legislative history of the Equal Pay Act and Title VII. This is simply a case where the Court has superimposed upon Title VII a "gloss of its own choosing."

Syllabus

ANDERSON BROS. FORD ET AL. *v.* VALENCIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80-84. Argued March 23, 1981—Decided June 8, 1981

Section 128 (a)(10) of the Truth in Lending Act (TILA) provides that in connection with closed-end consumer credit transactions, the creditor must disclose "any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates." Regulation Z of the Federal Reserve Board (Board), promulgated pursuant to the Board's authority under the TILA, essentially repeats the statute's disclosure requirement, defines "security interest" and "security" as "any interest in property which secures payment or performance of an obligation," and sets forth a nonexhaustive list of interests included in the terms. In 1977, respondents purchased an automobile from petitioner dealer under a retail installment contract that was assigned to petitioner Ford Motor Credit Co. A provision on the face of the contract disclosed that the seller retained a security interest in the automobile but did not refer to a provision on the back of the contract whereby the buyers, who were required to purchase physical damage insurance on the automobile protecting the interests of both the buyers and the seller, assigned to the seller any unearned insurance premiums that might be returned if the policy were canceled. Before making any payments on the contract or the insurance policy, respondents returned the automobile to the dealer and filed suit in federal court, alleging that the contract violated the TILA for failure to disclose on its face that the seller had acquired a "security interest" in unearned insurance premiums, and seeking statutory damages, attorney's fees, and costs. The District Court granted summary judgment for respondents, holding that the assignment of unearned insurance premiums created a "security interest" within the meaning of § 128 (a)(10), and the Court of Appeals affirmed.

Held: Such an assignment of unearned insurance premiums does not create a "security interest" that must be disclosed pursuant to the TILA. Pp. 211-223.

(a) In a proposed official staff interpretation, the Board has expressly stated that Regulation Z does not require a creditor to disclose as a security interest its right to receive insurance proceeds or unearned pre-

miums from a property insurance policy. Also the Board's revised Regulation Z, which was issued pursuant to the Truth in Lending Simplification and Reform Act of 1980, defines "security interest" as not including "incidental interests" such as interests in insurance proceeds or premium rebates. This definition does not purport to change the original Regulation Z with respect to whether an incidental interest in unearned insurance premiums must be disclosed, and thus is persuasive authority as to whether such an interest should be disclosed as a "security interest" under the unrevised regulation. Neither the original TILA nor the 1980 Act defines the term "security interest," and the legislative history of the 1980 Act fully supports the Board's revised regulation and its proposed interpretation of the unrevised regulation. Pp. 211–219.

(b) Although neither the 1980 Act's legislative history nor the Board's construction of the term "security interest" conclusively establishes the meaning of these words in the TILA, the Board's regulation implementing this legislation, as well as its interpretation of its own regulation, should be accepted by the courts since they are not repugnant to any provision in the TILA. Cf. *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555. The Board's position is supported by the legislative history of both the TILA and the 1980 Act, and is a permissible interpretation of the term "security interest" as used in the TILA. Pp. 219–223.

617 F. 2d 1278, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. STEWART, J., filed a dissenting opinion, in which BURGER, C. J., and BRENNAN and MARSHALL, JJ., joined, *post*, p. 223.

Aaron J. Kramer argued the cause and filed briefs for petitioners.

Alan A. Alop argued the cause for respondents. With him on the brief were *James O. Latturner* and *James D. Weill.**

**Peter D. Schellie* filed a brief for the Consumer Bankers Association et al. as *amici curiae* urging reversal.

Richard Scupi filed a brief for the UAW Legal Services Plan as *amicus curiae* urging affirmance.

Richard J. Rubin filed a brief for Indian Pueblo Legal Services, Inc., as *amicus curiae*.

JUSTICE WHITE delivered the opinion of the Court.

The issue presented in this case is whether an assignment of certain unearned insurance premiums created a "security interest" that should have been disclosed pursuant to the Truth in Lending Act (TILA), 82 Stat. 146, as amended, 15 U. S. C. § 1601 *et seq.*[1]

I

In September 1977, respondents purchased an automobile from petitioner Anderson Bros. Ford. They signed the dealer's standard automobile retail installment contract. This contract was assigned for value to petitioner Ford Motor Credit Co. A provision on the face of the contract disclosed that the seller retained a security interest in the automobile.[2] A provision on the back of the contract stated that the buyer was required to purchase and maintain physical damage insurance on the automobile, "protecting the interests of Buyer and Seller," and further stated:

> "Buyer hereby assigns to Seller any monies payable under such insurance, by whomever obtained, including returned or unearned premiums, and Seller hereby is authorized on behalf of both Buyer and Seller to receive or collect same, to endorse checks or drafts in payment thereof, to cancel such insurance or to release or settle any claim with respect thereto. The proceeds from such insurance, by whomever obtained, shall be applied toward replacement of the Property or payment of the indebtedness hereunder in the sole discretion of Seller."

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[1] The Truth in Lending Act was enacted as Title I of the Consumer Credit Protection Act, 82 Stat. 146.

[2] The provision stated:

"Security Interest: Seller shall have a security interest under the Uniform Commercial Code in the Property (described above) and in the proceeds thereof to secure the payment in cash of the Total of Payments and all other amounts due or to become due hereunder."

The "Property" was defined as the automobile.

If the insurance policy on the automobile were canceled for any reason prior to the expiration of the term of the policy, this provision would permit the creditor to apply any unearned insurance premiums toward payment of the remaining debt.[3]

In October 1977, before making any payments on the installment contract or on the insurance policy, respondents returned the automobile to Anderson Bros. Ford. They subsequently brought this action in federal court,[4] alleging, *inter alia*, that the sales contract violated the TILA because it did not disclose on the face of the contract that the seller had acquired a "security interest" in unearned insurance premiums.[5]

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[3] Respondents contend that under the contract provision quoted above, unearned insurance premiums could only be used to replace the automobile or to make payments on the buyer's debt. Petitioners assert that "[u]nder the assignment provision . . . any unearned [insurance] premiums will be used to provide replacement insurance coverage or applied to the debt." Brief for Petitioners 4. The Court of Appeals stated that the unearned premiums "may be used to purchase replacement insurance coverage," citing petitioners' brief on appeal. 617 F. 2d 1278, 1281 (CA7 1980). We need not resolve the proper interpretation of this contract provision to decide the issue before us.

[4] The TILA authorizes suits against original creditors and their assignees. 15 U. S. C. §§ 1614 and 1640.

[5] The TILA does not state that the disclosure required by the statute must be made on the face of the contract. It simply provides:

"Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended, the information required under this part or part D of this subchapter." 15 U. S. C. § 1631 (a).

However, the applicable Federal Reserve Board regulations provide:

"All of the [required] disclosures shall be made together on either:

"(1) The note or other instrument evidencing the obligation on the same side of the page and above the place for the customer's signature; or

"(2) One side of a separate statement which identifies the transaction." 12 CFR § 226.8 (a) (1980).

See also 12 CFR § 226.8 (b)(5) (1980). Petitioners do not challenge the validity or applicability of this regulation.

This claim was based on § 128 (a)(10) of the TILA, which provides in pertinent part:

> "In connection with each consumer credit sale not under an open end credit plan, the creditor shall disclose each of the following items which is applicable:
>
> . . . . .
>
> "A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates." 82 Stat. 155, 15 U. S. C. § 1638 (a)(10).

This disclosure requirement is essentially repeated in § 226.8 (b)(5) of Regulation Z, a Federal Reserve Board regulation promulgated pursuant to the Board's authority under § 105 of the TILA.[6] Under the regulation, a creditor must disclose:

> "A description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates . . . ." 12 CFR § 226.8 (b)(5) (1980).

Respondents sought statutory damages, attorney's fees, and costs.[7]

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[6] Section 105 of the TILA, as set forth in 15 U. S. C. § 1604, provides:

"The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith."

[7] A consumer who files an individual action against a creditor for failure to make the disclosures required by the TILA may recover twice the amount of the finance charge, with a minimum recovery of $100 and a maximum recovery of $1,000, or may recover any actual damages sus-

The District Court granted summary judgment for respondents, holding that an assignment of unearned insurance premiums creates a "security interest" within the meaning of § 128 (a)(10). App. 33–35. The Court of Appeals for the Seventh Circuit affirmed. 617 F. 2d 1278 (1980). Recognizing that the TILA does not define the term "security interest," the Court of Appeals relied on the definition contained in Regulation Z:

> " 'Security interest' and 'security' mean any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code, real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded, mechanic's, materialmen's, artisan's, and other similar liens, vendor's liens in both real and personal property, the interest of a seller in a contract for the sale of real property, any lien on property arising by operation of law, and any interest in a lease when used to secure payment or performance of an obligation." 12 CFR § 226.2 (gg) (1980).

The Court of Appeals concluded that the assignment of unearned insurance premiums created an "interest in property which secure[d] payment or performance of an obligation" within the meaning of Regulation Z, and thus created a "security interest" that must be disclosed under § 128 (a)(10). The Court of Appeals accordingly affirmed the judgment below.[8]

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tained as a result of the failure to disclose. 15 U. S. C. § 1640 (a). Respondents did not contend that they had suffered any actual damages as a result of the alleged TILA violation.

[8] Two judges filed separate concurring opinions, joining in the opinion for the panel but expressing concern that by requiring the prominent disclosure of an "incidental" security interest, the court was increasing the

We granted certiorari to settle whether such an assignment of unearned insurance premiums must be disclosed as a "security interest" under the TILA.[9] 449 U. S. 981 (1980). We reverse.

II

Although the Court of Appeals' construction of the Act and of Regulation Z is shared by three of the four other Courts of Appeals that have ruled on the question,[10] this view, which is essentially a claim that the plain language of the statute and the regulation requires the result reached by

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complexity of the disclosures required by the TILA without furthering the purposes of the statute.

Judge Cudahy stated in his concurring opinion:

"I do not read [the opinion for the panel] as seriously suggesting that the result we reach furthers the underlying purposes of the Truth in Lending Act. Among these meritorious purposes are the disclosure to buyers of the costs of credit and the alerting of customers to the possibility that their property may be reached to satisfy the obligation which they have incurred.

"Here we require the prominent disclosure of a rather esoteric right to unearned premiums for physical damage insurance (protecting both the seller's and the buyer's interest in the property), which may be used to provide replacement insurance coverage or applied against the buyer's debt in the event of cancellation of the insurance. This 'security interest' is normal in the circumstances but is entirely incidental to the principal consumer credit transaction. . . .

"To disclose this 'security interest' on the *face* of the contract (which is the point here) is merely to add virtually inconsequential information—lengthening, complicating and trivializing the disclosure for no apparent benefit." 617 F. 2d, at 1293.

[9] We also granted certiorari to consider petitioners' contention that if we were to hold that disclosure of an assignment of unearned insurance premiums is required under the TILA, our ruling should be made prospective only. Since we hold that such disclosure is not required, we need not address that issue.

[10] See *Murphy* v. *Ford Motor Credit Co.*, 629 F. 2d 556 (CA8 1980); *Edmondson* v. *Allen-Russell Ford, Inc.*, 577 F. 2d 291 (CA5 1978); *Gennuso* v. *Commercial Bank & Trust Co.*, 566 F. 2d 437 (CA3 1977).

the court below, has recently been challenged on several fronts. First, based in part on the legislative history of the 1980 amendments to the TILA, see *infra*, at 218–219, the Court of Appeals for the Tenth Circuit has concluded that the meaning of the term "security interest" as used in the TILA is not so plain and has held that the creditor's interest in unearned insurance premiums need not be disclosed as a security interest under either the statute or Regulation Z. *James* v. *Ford Motor Credit Co.*, 638 F. 2d 147 (1980).

Second, in September 1980, the Board, the agency that issued Regulation Z, published for comment Official Staff Interpretation FC–0173, regarding security interest disclosures in closed-end consumer credit transactions. 45 Fed. Reg. 63295. Although the staff recognized that several courts held a contrary view, its clearly expressed position was that neither § 226.2 (gg) nor § 226.8 (b)(5) requires a creditor to disclose as a security interest its right to receive insurance proceeds or unearned premiums from a property insurance policy:

> "The staff believes that a creditor is not required by [§ 226.8 (b)(5)] to disclose its right to receive insurance proceeds or unearned insurance premiums nor to disclose that it is named as loss payee or beneficiary on an insurance policy. Truth in Lending disclosures are meant to provide useful information to consumers to enhance credit shopping. Consumers do need to know that they risk the loss of certain property if they default. The disclosures under § 226.8 (b)(5) inform consumers of which property is subject to that risk at the time the credit decision is being made. We believe that information regarding the creditor's interest in insurance proceeds and unearned premiums would not be used in comparison shopping. Although a technical reading of the security interest definition might cover a creditor's interest in insurance proceeds and unearned premiums, it is our opinion that such incidental interests are not

> the type of interests meant to be covered by § 226.8 (b) (5)." *Ibid.*

This construction of Regulation Z, the staff concluded, "better serves the purpose of the statute and the regulation to convey in a meaningful way information that can be used by consumers in shopping for credit." *Ibid.*

We are aware that after we granted certiorari in this case, the Board deferred final action on FC–0173; but we cannot agree that the staff's views expressed in the proposed ruling are wholly without significance. The comment period on the proposed interpretation expired on October 24, 1980, the proposal has not been withdrawn or revised, and it appears from the Board's public statement that final action was deferred only because it was "inappropriate" to do otherwise in the light of our intervening grant of certiorari. *Id.*, at 84074.

We need not, however, rest on FC–0173 for the Board's construction of the statute or of Regulation Z with respect to the scope of the security interest disclosure requirement. On March 31, 1980, the President approved the Truth in Lending Simplification and Reform Act (1980 Act) as Title VI of the Depository Institutions Deregulation and Monetary Control Act of 1980. 94 Stat. 168. The 1980 Act, which will be fully effective on April 1, 1982, will amend the TILA in many respects but will leave substantial portions of the TILA unchanged. It will amend § 128 (a)(10) of the TILA to require a creditor to make the following disclosure with respect to any "security interest" acquired by the creditor in a closed-end consumer credit transaction:

> "Where the credit is secured, a statement that a security interest has been taken in (A) the property which is purchased as part of the credit transaction, or (B) property not purchased as part of the credit transaction identified by item or type." § 614 (a)(9), 94 Stat. 179.

Like the TILA, however, the 1980 Act does not define the term "security interest."

The 1980 Act provides that all implementing regulations must be promulgated at least one year prior to the effective date of the Act and that any creditor may comply with the revised regulations prior to the effective date of the Act. § 625, 94 Stat. 185–186. The Board accordingly revised Regulation Z, effective April 1, 1981, but with compliance being optional until April 1, 1982. 46 Fed. Reg. 20848 (1981). Section 226.18 (m) of revised Regulation Z requires the creditor to disclose in connection with closed-end consumer credit transactions

> "[t]he fact that the creditor has or will acquire a security interest in the property purchased as part of the transaction, or in other property identified by item or type." *Id.*, at 20903.

Section 226.2 (a)(25) defines the term "security interest" as follows:

> "'*Security interest*' means an interest in property that secures performance of a consumer credit obligation and that is recognized by state or federal law. It does not include incidental interests such as interests in proceeds, accessions, additions, fixtures, insurance proceeds (whether or not the creditor is a loss payee or beneficiary), premium rebates, or interests in after-acquired property. For purposes of disclosure under §§ 226.6 and 226.18, the term does not include an interest that arises solely by operation of law. However, for purposes of the right of rescission under §§ 226.15 and 226.23, the term does include interests that arise solely by operation of law." *Id.*, at 20894.

Although the new regulation changes the Board's prior definition of a "security interest" in some respects,[11] there is

[11] For example, the revised regulation excludes a creditor's interest in

no indication that the definition was being changed with respect to unearned premiums. When the Board issued revised Regulation Z, the Board explained that it distinguishes an incidental interest in unearned insurance premiums from a "security interest" that must be disclosed:

> "[T]here is a difference between an incidental interest and an interest that is the essence of the transaction. For example, when an automobile is financed, the insurance proceeds are incidental to the primary security interest, the automobile. The creditor's interest in such insurance would not be a security interest under the regulation. On the other hand, when the credit transaction is the financing of an insurance policy, the creditor's interest in that policy is just like a purchase money security interest and would be disclosed as a security interest." [12]

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after-acquired property from the definition of a "security interest." The regulations implementing the TILA, however, expressly require disclosure of a creditor's interest in after-acquired property. See 12 CFR § 226.8 (b)(5) (1980).

[12] 46 Fed. Reg. 20853 (1981).

The Board's analysis demonstrates that the staff's proposed official interpretation of Regulation Z does not conflict with FRB Public Information Letter No. 377, cited by respondents. FRB Public Information Letter No. 377 is an informal staff interpretation of Regulation Z that was issued in 1970. The interpretation was requested by a loan company whose customers purchased single premium lifetime accidental death and dismemberment policies with the proceeds of their loans. The loan company was designated as the owner of the policy and retained the right to cancel the policy and apply any premium refund to the unpaid balance of the loan if the customer defaulted on the loan. The staff responded: "Under the circumstances, we think it would be appropriate to disclose the loan company's ownership of the policy as a type of 'security interest' . . . ." CCH [1969–1974 Transfer Binder] Cons. Cred. Guide ¶ 30,555.

Petitioners contend that the loan company's interest in the policy differs from petitioners' interest in the unearned insurance premiums in this case. The loan company's interest "was not merely incidental or subordinate to some far more significant interest securing payment of the loan." Reply

Since this reasoning applies to the TILA as well as to the 1980 Act, we do not understand the Board to have revised Regulation Z with respect to whether an incidental interest in unearned insurance premiums must be disclosed.[13] The Board's revised regulation construes the statutory term "se-

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Brief for Petitioners 9, n. 12. We agree with petitioners that the situation described in the letter is distinguishable from this case.

One other informal staff interpretation of Regulation Z referred to disclosure of unearned insurance premiums. In FRB Public Information Letter No. 1263, the staff responded to an inquiry regarding how an interest in unearned insurance premiums should be identified. The letter pointed out that "a more fundamental matter [is] whether a security interest exists at all" and then suggested that the creditor determine whether as a matter of state law he had acquired an interest in property securing payment of the debt. CCH [1974–1977 Transfer Binder] Cons. Cred. Guide ¶ 31,736. "[A]ssuming this is a security interest for purposes of Regulation Z, the determination of what type of security interest it is should be made in accordance with State law." *Ibid.* This informal interpretation did not resolve whether disclosure of a creditor's interest in unearned insurance premiums is required under the TILA. Although this letter focused on state law, revised Regulation Z defines a "security interest" as an "interest in property that secures performance of a consumer credit obligation and that is recognized by state or federal law." 46 Fed. Reg. 20894 (1981).

[13] When the Board issued proposed regulations implementing the 1980 Act, it stated that the 1980 Act had clarified "certain complex legal questions" regarding the proper interpretation of the TILA, including questions about adequate disclosure of security interests. 45 Fed. Reg. 80731, 80733 (1980).

In its commentary accompanying the revised regulations, 46 Fed. Reg. 20853 (1981), the Board noted that its definition of "security interest" was considerably narrower than § 226.2 (gg) of the unrevised regulation, in that it excluded a number of interests that would have been considered security interests under the unrevised regulation. Some of these interests were identified. The Board went on to observe that "there is a difference between an incidental interest and an interest that is the essence of the transaction." *Ibid.* Only the latter must be disclosed as a "security interest." We do not understand the Board's commentary to indicate in any way that the revised regulation altered the meaning of Regulation Z with respect to whether a creditor must disclose an interest in unearned insurance premiums in a transaction such as is involved in this case.

curity interest" which appears, undefined, in both the TILA and the 1980 Act; it also defines the term "security interest" appearing in the revised regulation. The same term had been used in the original Regulation Z, and it seems to us that the Board's definition of "security interest" in the revised regulation is persuasive authority as to whether an interest in unearned insurance premiums should be disclosed as a "security interest" under the unrevised regulation. As we see it, the term "security interest" as used in both the revised and unrevised versions of Regulation Z does not include an interest in unearned insurance premiums in a transaction such as this.

Under the TILA and the 1980 Act, the Board is authorized to prescribe regulations, which "may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper" to carry out the purposes of the statute.[14] In light of this statutory authority, we should not expressly or by implication invalidate as contrary to the statute the Board's revised regulation concerning disclosure of security interests, which with respect to the disclosure of interests in unearned premiums did not purport to change the original Regulation Z and reiterates the view expressed in FC–0173 that an interest in unearned premiums is not a "security interest" for purposes of the disclosure provision.[15]

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[14] 15 U. S. C. § 1604. This section will be renumbered § 1604 (a) under the 1980 Act. 94 Stat. 170.

[15] Because we do not understand the exclusion of unearned insurance premiums from the definition of "security interest" to have changed the administrative construction of the statute, we need not consider whether if the revised regulation had worked such a change, the case should be decided under the revised regulation which was effective as of April 1, 1981. See *Bradley* v. *Richmond School Board*, 416 U. S. 696, 711 (1974); *Thorpe* v. *Housing Authority*, 393 U. S. 268, 281–283 (1969); *United States* v. *Schooner Peggy*, 1 Cranch 103, 110 (1801).

The legislative history of the 1980 Act fully supports the Board's revised regulation regarding disclosure of a creditor's interest in unearned insurance premiums and its proposed interpretation of the unrevised regulation. The Report of the Senate Committee on Banking, Housing, and Urban Affairs on the 1980 Act explained:

> "When a security interest is being taken in property purchased as part of the credit transaction, this section requires a statement that a security interest has been or will be taken in the property purchased. When a security interest is being taken in property not purchased as part of the credit transaction, the Committee intends this provision to require a listing by item or type of the property securing the transaction, but not a listing of related or incidental interests in the property. For example, a loan secured by an automobile (not being purchased with the proceeds of the loan) would require a statement indicating that the loan is secured by an automobile but would not require a listing of incidental or related rights which the creditor may have such as insurance proceeds or unearned insurance premiums, rights arising under, or waived in accord with state law, accessions, accessories, or proceeds." S. Rep. No. 96–368, p. 30 (1979).[16]

Furthermore, on the floor of the Senate a member of the responsible Committee observed:

> "Many cases have resulted from the complex security interest disclosure requirements under the law. An il-

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[16] Although the Committee Report states that the creditor is not required to disclose his "incidental interest" in unearned insurance premiums if the loan is secured by an automobile that is not purchased with the proceeds of the loan, there is no sensible reason for applying a different rule if the loan is secured by an automobile that is purchased with the proceeds of the loan. In either situation the 1980 Act requires the creditor to disclose any "security interest" he has acquired.

> lustrative case is *Gennuso* v. *Commercial Bank and Trust Co.*, 455 F. Supp. 461 (W. D. Pa. 1976); 566 F. 2d 437, (3rd Cir. 1977), which required the creditor's right in property insurance proceeds and unearned property insurance premiums, to be disclosed as a 'security interest.' Although as presently written the law does not require that result, S. 108 should prevent such ludicrous interpretations by requiring merely a positive indication if a security interest is being taken in the property purchased and if it is in property not being purchased in the transaction, simply a general listing of the type of property without a listing of incidental related interests." 125 Cong. Rec. 9160 (1979).

With one exception, not pertinent here, the Committee Chairman, Senator Proxmire, who was the sponsor of the TILA, agreed with these remarks. *Id.*, at 9159, 9972. In light of these indications from the 1980 Act's history, it is unlikely that the courts would invalidate as contrary to the 1980 Act or the TILA either the security interest disclosure provisions with respect to unearned insurance premiums in revised Regulation Z or the interpretation of the unrevised regulation contained in FC–0173.

III

Of course, neither the legislative history of the 1980 Act nor the Board's construction of the term "security interest" under either the TILA or the 1980 Act conclusively establishes the meaning of these words in the TILA. But as we so plainly recognized in *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555 (1980), absent some obvious repugnance to the statute, the Board's regulation implementing this legislation should be accepted by the courts, as should the Board's interpretation of its own regulation. We discern no such repugnance with any provision in the TILA.

The purpose of the TILA is to promote the "informed use of credit" by consumers. 15 U. S. C. § 1601. See *Ford*

Motor Credit Co. v. *Milhollin, supra,* at 559, 568; *Mourning* v. *Family Publications Service, Inc.,* 411 U. S. 356, 363–368 (1973). Congress sought to assure "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him." 15 U. S. C. § 1601.

The TILA was enacted in May 1968. As originally drafted, the House and Senate truth-in-lending bills focused primarily on the cost of credit.[17] Neither bill required disclosure of security interests acquired by a creditor in connection with a consumer credit transaction. In January 1968, while the legislation was under consideration in the House, Representative Cahill, who was not a member of the Committee that had reported out the bill, offered several amendments designed "to improve the truth-in-lending provisions with respect to mortgage transactions." 114 Cong. Rec. 1611 (1968). One of the amendments, which was adopted without debate, required the following disclosure in closed-end consumer credit transactions:

> "[A] description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates." *Id.,* at 1610.[18]

This provision became § 128 (a)(10) of the TILA.

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[17] The 1967 Committee Reports explained that "by requiring all creditors to disclose credit information in a uniform manner, and by requiring all additional mandatory charges imposed by the creditor as an incident to credit [to] be included in the computation of the applicable percentage rate, the American consumer will be given the information he needs to compare the cost of credit and to make the best informed decision on the use of credit." H. R. Rep. No. 1040, 90th Cong., 1st Sess., 13; S. Rep. No. 392, 90th Cong., 1st Sess., 3 (virtually identical language).

[18] Representative Cahill proposed that this language be added to § 203 (b) of H. R. 11601, governing disclosures for consumer credit sales other than sales under an open-end credit plan. Section 203 (b) later became § 128 of the TILA, 15 U. S. C. § 1638. He proposed that the same

The Cahill amendments were principally designed to prevent homeowners from being victimized by "vicious secondary mortgage schemes." *Id.*, at 1611. It was explained that "in many cases [a homeowner entering into a consumer credit transaction] is never informed nor aware that his home is being made subject to a mortgage." *Ibid.* The amendment would require the creditor to disclose that he was acquiring a security interest in the borrower's residence. Insofar as pertinent here, the Cahill amendments were accepted by the Senate and became part of the TILA as finally adopted.[19]

language be added to § 203 (c) of H. R. 11601, governing disclosures for extensions of credit other than sales under an open-end credit plan. Section 203 (c) later became § 129 of the TILA, 15 U. S. C. § 1639.

[19] In drawing the Senate's attention to Representative Cahill's amendments, the sponsor of the Senate truth-in-lending bill, stated:

"Congressman CAHILL, of New Jersey, has offered an important amendment to the truth-in-lending bill which tightens up on the second mortgage racket. First, it would require a 3-day waiting period before a second mortgage transaction can be completed. Second, it would require a disclosure of the fact that credit is being secured by a mortgage on the homeowner's property. Third, the amendment increases the legal rights of consumers with respect to those who purchase mortgages from the original home improvement contractor." 114 Cong. Rec. 5024 (1968).

In presenting the Conference Report on the TILA to the House, Representative Sullivan explained that the House conferees had succeeded in retaining the protections created by the Cahill amendments. She described those amendments as "a series of amendments in the House, to strike at home improvement racketeers who trick homeowners, particularly the poor, into signing contracts at exorbitant rates, which turn out to be liens on the family residences. Any credit transaction which involves a security interest in property must be clearly explained to the consumer as involving a mortgage or lien; any such transaction involving the consumer's residence—other than in a purchase-money first mortgage for the acquisition of the home—carries a 3-day cancellation right." *Id.*, at 14388.

Similarly, Senator Proxmire, presenting the Conference Report on the truth-in-lending bill to the Senate, described the Cahill amendments as providing "additional safeguards in the second mortgage area" and explained that the security interest disclosure provisions would require creditors to "describe any security interest in real property—such as a second mortgage—arising from the credit transaction." *Id.*, at 14488.

Despite the focus on the second mortgage problem, Congress did not limit § 128 (a)(10) to security interests in real property. The statutory language requires disclosure of "any security interest held or to be retained or acquired by the creditor." It is thus uncontested that § 128 (a)(10) requires a creditor to disclose to a consumer purchasing an automobile or other property on credit that the creditor retains a security interest in the property purchased.

Unaided by an administrative construction of the TILA and Regulation Z, a court could easily conclude, based on the language of the statute and of Regulation Z, that the interest in unearned insurance premiums acquired by the creditor in this case should be characterized as a "security interest" that must be disclosed. But, in light of the proposed official staff interpretation of Regulation Z, the revised regulation defining a "security interest," and the Board's commentary on the difference between an "incidental interest" in unearned insurance premiums and a "security interest," it is evident that the Board does not consider the creditor's interest in unearned insurance premiums in a transaction such as this one to be a "security interest" that must be disclosed under the TILA. The Board's position is supported by the legislative history of both the TILA and the 1980 Act, and we hold that it is a permissible interpretation of the term "security interest" as used in the TILA.[20] Although designed to provide meaningful guidance to consumers in

[20] This Court has frequently relied on the principle that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Holy Trinity Church* v. *United States*, 143 U. S. 457, 459 (1892). See, *e. g.*, *Steelworkers* v. *Weber*, 443 U. S. 193, 201 (1979); *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837, 849 (1975). "When aid to construction of the meaning of words, as used in the statute [or regulation], is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States* v. *American Trucking Assns.*, 310 U. S. 534, 543–544 (1940) (footnote omitted).

shopping for credit, the TILA as originally drafted did not require disclosure of or otherwise deal with security interests; and the security interest disclosure provision was added to the TILA because of Congress' particular concern about the need to warn consumers of the creditor's acquisition of a particular type of security interest—a second mortgage on the borrower's home. The Board's view that disclosure of a creditor's incidental interest in unearned insurance premiums would not measurably further the TILA's purpose of aiding consumers to shop for credit, and that the term "security interest" as used in the TILA, the 1980 Act, and in Regulation Z should not be construed as including such an interest, is consistent with the underlying purpose of the TILA. This interpretation of the term "security interest" strikes a balance between "meaningful disclosure" and "informational overload." [21] As we emphasized in *Milhollin*, the task of striking the proper balance is "an empirical process that entails investigation into consumer psychology and that presupposes broad experience with credit practices." Administrative agencies are "better suited than [the] courts to engage in such a process." 444 U. S., at 568–569.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE STEWART, with whom THE CHIEF JUSTICE, JUSTICE BRENNAN, and JUSTICE MARSHALL join, dissenting.

The Court correctly states that the respondents in this case maintain "that the plain language of the statute and the

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[21] In *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555 (1980), we stressed that the TILA seeks to provide "meaningful disclosure" of credit terms:

"*Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between 'competing considerations of complete disclosure . . . and

regulation requires the result reached by the court below." *Ante*, at 211–212. Yet the Court nowhere attempts a direct answer to the respondents' contention. Despite the elementary principle that the starting point in construing a statute is the language of the statute itself, the Court simply ignores the plain language of the TILA and the equally plain language of the only applicable Federal Reserve Board construction of it. Instead, the Court contrives to discover contrary legislative intent in such dubious materials as the legislative history of a subsequent statute which does not cover the transaction at hand, a regulation issued to implement that inapplicable statute, and an unofficial administrative staff interpretation which, by its own express terms, is a mere proposal intended to have no legal effect.[1]

In my opinion, the statutory language at issue here unequivocally supports the decision of the Court of Appeals, and should itself dispose of this case. See *United States* v. *Wiltberger*, 5 Wheat. 76, 95–96 (Marshall, C. J.). But even were the Court justified in leaping over the language of Congress in search of a conflicting indication of congressional intent, the secondary authority on which the Court relies does not withstand examination. As a result, the Court does damage to settled principles of administrative law and statutory construction—damage that could extend to issues of far greater moment than the very narrow question under the Truth in Lending Act at issue here.

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the need to avoid . . . [informational overload].'" *Id.*, at 568, quoting S. Rep. No. 96–73, p. 3 (1979) (accompanying the 1980 Act).

[1] The Court does indirectly refer to the plain language of the TILA when it concedes that "[u]naided by an administrative construction of the TILA and Regulation Z, a court could easily conclude, based on the language of the statute and Regulation Z, that the interest in unearned insurance premiums acquired by the creditor in this case should be characterized as a 'security interest' that must be disclosed." *Ante*, at 222. But the Court does not rely on the one administrative construction that resolves any possible uncertainty in the statutory language, see 12 CFR § 226.2 (gg) (1980), and never explains why any further aid is necessary.

Section 128 (a)(10) of the TILA requires the creditor to disclose

> "[a] description of *any security interest* held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates." 15 U. S. C. § 1638 (a)(10) (emphasis added).[2]

The word "any" can only mean exactly what it says, and so the sole question is whether the credit company's right to the consumer's unearned insurance premium is a "security interest." The credit contract requires the consumer to buy physical damage insurance "protecting the interests of Buyer and Seller," and grants to the seller any unearned insurance premiums, to be "applied toward replacement of the Property or payment of the indebtedness hereunder in the sole discretion of Seller." If unaided common sense cannot identify the seller's rights under this clause as a "security interest," the language of the applicable Federal Reserve Board definition of "security interest" under the TILA quickly and unmistakably does so:

> "'*Security interest' and 'security' mean any interest in property which secures payment or performance of an obligation.* The terms *include, but are not limited to,* security interests under the Uniform Commercial Code, real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded, mechanic's, materialmen's, artisan's, and other similar liens, vendor's liens in both real and personal property, the in-

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[2] Regulation Z virtually duplicates the statutory language, requiring a creditor to disclose

"[a] description or identification of the type of *any* security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates . . . ." 12 CFR § 226.8 (b)(5) (1980) (emphasis added).

terest of a seller in a contract for the sale of real property, any lien on property arising by operation of law, and any interest in a lease when used to secure payment or performance of an obligation." 12 CFR § 226.2 (gg) (1980) (emphasis added).

Ford's assignment clause clearly meets the Federal Reserve Board definition. First, the assignment clause plainly creates an interest in property. In this case, the annual premium for physical damage insurance was $215, and in other instances it could be considerably higher. The amount of the unearned insurance premium acquired by the creditor will depend on the timing of the cancellation which triggers the creditor's rights under the assignment clause. But except in the rare case in which the repossession of the car precisely coincides with the end of the insurance term, the creditor will be able to recover a refund of some sort, and since repossession might occur right after a new term of insurance begins, the contract essentially represents an interest equal to the value of the premium itself.[3]

Second, the assignment clause clearly "secure[s] payment or performance of an obligation." The contract expressly

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[3] The assignment clause may therefore be of more than minor significance to a buyer. It would allow the creditor to attach, without full court procedure, perhaps hundreds of dollars which the buyer has spent on insurance for a car which he no longer possesses. A consumer might well want to avoid giving his creditor such a right, and so disclosure of the assignment might well advance the congressional goal of informed credit shopping by consumers. 15 U. S. C. § 1601. But in any event, where the language of the statute clearly covers this security interest, it is not for the courts to assess the significance of the interest.

The Court quotes, apparently with approval, the concurring opinion of Judge Cudahy of the Court of Appeals in this case, which laments that disclosure of the "virtually inconsequential information" about the assignment of the insurance premiums trivializes the disclosure "for no apparent benefit." *Ante*, at 211, n. 8. Even were Judge Cudahy right about the value of the disclosure at issue here, he, unlike today's Court, did not allow his own appraisal of the question to obscure unequivocal statutory language.

states that the creditor is to use any refunded premiums for "replacement of the Property or payment of the indebtedness hereunder." Even if Ford is correct in asserting that the purpose of the assignment is to continue the insurance coverage on the car during the life of the loan, see *ante*, at 208, n. 3, the assignment is still a security interest under Regulation Z, since it will be used to secure performance of the buyer's obligation to maintain insurance coverage.[4] The applicable statute and regulation thus both clearly declare the assignment of unearned insurance premiums to be a security interest which must be disclosed on the face of the credit contract.[5]

Virtually ignoring the Federal Reserve Board definition of "security interest" in § 226.2 (gg) of Regulation Z—the applicable administrative pronouncement which effectively settles the issue in favor of the respondents—the Court relies instead on an unofficial staff interpretation which, by its own

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[4] Even if the comprehensive language with which the applicable version of Regulation Z begins were insufficient to demonstrate that the assignment clause is a security interest under the TILA, the assignment falls within at least two of the nonexhaustive enumerated examples in the definition. Clauses assigning unearned insurance premiums may well qualify as "consensual . . . liens whether or not recorded," 12 CFR § 226.2 (gg) (1980), or "security interests under the Uniform Commercial Code," see Ill. Rev. Stat., ch. 26, ¶¶ 1–201 (37), 9–102 (2), 9–306, 9–312 (1979).

[5] The Court seeks to find some support for its restrictive reading of the TILA in the legislative history of the Act. Representative Cahill, who introduced the "security interest" provision in the House, stated that the primary reason for the provision was to combat the second-mortgage schemes to which many homeowners had fallen prey, and sponsors of the provision in both Houses appear to have reinforced this view. But the quoted statements from the legislative history do not purport to be explanations of specific statutory language. Rather, they are generalized declarations about the primary purpose of the bill, and so do not preclude other situations clearly covered by the language of the statute. Indeed, the Court seems to agree, recognizing that the narrow focus of the quoted legislative history on the problem of second mortgages on real estate cannot possibly explain the broad language of § 128 (a)(10). *Ante*, at 222.

terms, is entitled to no weight whatsoever. In September 1980, the Board released Proposed Official Staff Interpretation FC–0173, 45 Fed. Reg. 63295, asking for comments on a proposed staff opinion that a creditor's right to unearned insurance premiums is not required to be disclosed under the statute. The proposal expressly stated:

> "(2) The letter is being issued as a proposal, rather than in final form, and interested persons are invited to submit relevant comment.
>
> "(3) After comments are considered, this official staff interpretation may be amended, may be withdrawn or may remain unchanged."

The Board went on to tell creditors in a November 1980 mailing that "[t]his proposed interpretation may not be relied upon until final action is taken." As the Court correctly notes, the Board has never taken any final action. On December 16, 1980, it deferred further consideration indefinitely.[6] The Court's reliance on this proposal therefore directly contravenes the intention of the proposal itself—that it is to have *no* legal effect.[7]

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[6] Conceding, as it must, that the Board took no final action on the proposal, the Court offers two unpersuasive reasons for nevertheless according it weight in interpreting the statute. *Ante*, at 213. First, the Court notes that the period for public comment ended on October 24, 1980. That fact hardly justifies treating the proposed rule as final, because we do not know the views expressed in the comments received, nor can we speculate on whether those comments would have reinforced or altered the staff's view on the statutory question at hand. Second, the Court states that the Board deferred final action only because it thought final action was inappropriate in light of our grant of certiorari in the present case. I do not see how this purported ground for deferral indicates what the Board would have done had it not deferred final action. If anything, we might assume that the Board thought its opinion on the issue unnecessary in light of the impending decision by this Court. If so, it is rather curious that the Court believes it can rely on the proposal.

[7] That the Board intended the proposal to have no legal effect finds further proof in the unusual procedure the Board used in issuing the pro-

Whatever the significance of the present case, the Court's approach threatens general damage to important principles of administrative law and statutory interpretation. An administrative agency issues proposals to invoke public comment which the agency can evaluate and assimilate in formulating new regulations. If an agency is to infer from the Court's opinion that its proposals may be ascribed significant or even decisive weight in litigation involving construction of the statute governing the agency, it may take any of three extremely unfortunate courses. First, an agency may decide not to issue proposals at all for fear of binding itself in future action. Second, an agency may rush to issue ill-conceived proposals in the hope of affecting the decisions of courts or the conduct of regulated persons, evading the risks and responsibilities of submitting its proposals to public comment and other rulemaking procedures. Third, an agency may frame its proposals in interrogative, rather than declarative, form, thereby denying itself the benefit of public comments that evaluate or interpret the precise language of a hypothetical final rule. The Court's use of FC–1073 here thus threatens to undermine the very purpose of public comment in rulemaking procedures.[8]

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posal. Normally, a creditor requests the Board for an official interpretation of a statutory or regulatory provision. The Board will then issue an official interpretation, and then decide whether to request public comment. If it does so, the interpretation is withdrawn while comments are received; otherwise, the official interpretation stands. *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 567, n. 10. For FC–1073, however, the Board never issued an official interpretation, but only a proposal, and immediately requested public comment.

[8] The Court's reliance on FC–1073 finds no support in our decision in *Ford Motor Credit Co.* v. *Milhollin*, *supra*. The Court there stated that "*absent a clear expression*, it becomes necessary to consider the implicit character of the statutory scheme." *Id.*, at 560 (emphasis added). In that case, the Court found no clear expression in the statute or regulation on the question whether the creditor had to disclose an acceleration clause on the face of the agreement, and therefore found it necessary and proper

The Court continues its attack on established principles of statutory construction by invoking the Truth in Lending Simplification and Reform Act of 1980 to help it discover the meaning of the TILA, which was enacted 12 years earlier. First, the Court considers the revised sections of Regulation Z issued by the Board to implement the new statute, and in a remarkable *ipse dixit*, pronounces that the new definition, which excludes such "incidental interests" as liens on insurance premiums, reveals "no indication that the definition was being changed with respect to unearned premiums." *Ante*,

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to defer to the views of the Federal Reserve Board staff in construing the statute. *Ibid.* Here, by contrast, the statute and definitional rule combine in an unequivocally clear expression on the disclosure issue.

Moreover, in *Milhollin*, the Court inferred a congressional preference for resolving interpretive issues by "*uniform* administrative decision." *Id.*, at 568 (emphasis added). But FC–1073 hardly represents a uniform Board view of the statute. As quoted by the Court, the proposal concedes that a "technical reading of the security interest definition might cover a creditor's interest in insurance proceeds and unearned insurance premiums," but concludes that "it is our opinion that such *incidental* interests are not the type of interests meant to be covered by § 226.8 (b)(5)." *Ante*, at 212–213 (emphasis added).

What FC–1073 calls a "technical reading" of the Board definition of "security interest" in § 226.2 (gg) of Regulation Z is in fact the only permissible reading of that definition. The proposal letter effectively concedes that it is in conflict with the applicable official Board regulation, and nothing in Regulation Z supports the view in the proposal that 15 U. S. C. § 1638 (a)(10), which speaks of "any" security interest, was intended to exclude "incidental" interests. FC–1073 thus directly contravenes the higher administrative authority of an official regulation. The proposal, indeed, also conflicts with at least one other informal staff interpretation by the Board. In FRB Public Information Letter No. 377, CCH [1969–1974 Transfer Binder] Cons. Cred. Guide ¶ 30,555, the Board expressly told an inquiring creditor that he should disclose to the debtor that in the event of default the credit company could cancel the life insurance policy the debtor was to buy with the loan money, and could apply any premium refund to the balance of the loan. Contrary to the Court's suggestion, *ante*, at 215–216, n. 12, Letter No. 377 does not rely on the notion that in that instance, as opposed to the present case, the credit was extended expressly to enable the consumer to buy insurance.

at 215. The new definition is, of course, utterly inconsistent with the earlier definition. The Court then mistakenly declares that the Board explanation for the new definition published in the Federal Register in 1981 "applies to the TILA as well as to the 1980 Act." *Ante*, at 216.[9]

To compound the error, the Court goes on to examine the legislative history of the 1980 Simplification Act. There is no suggestion that the new statute applies retroactively, and there could not be. Rather, the Court states that the legislative history of the 1980 Act "fully supports the Board's *revised* regulation . . . and its proposed interpretation of the *unrevised* regulation." *Ante*, at 218 (emphasis added). Since the new regulation, issued to implement a new nonretroactive statute, cannot apply to the case at hand, I cannot understand how it is at all relevant in this case that the new regulation is consistent with the new statute.

The legislative history of the 1980 Act cited by the Court, *ante*, at 218–219, proves the perfectly reasonable—and irrelevant—proposition that the new Regulation Z properly construes the intent of the 1980 Act in excluding liens on unearned insurance premiums as security interests. But nothing in the Report of the Senate Committee on Banking, Housing, and Urban Affairs suggests any intent to construe the old law applicable to this case. "If the legislative history . . . indicates anything, it is that Congress thought that it was changing the law by changing the language of the Act." *United States* v. *Plesha*, 352 U. S. 202, 208. Doubtless Congress thought the TILA deficient, but that is why it wrote a new law.

The Court also cites a statement by Senator Garn purportedly attributing to the TILA a meaning contrary to its

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[9] The explanation states: "This definition [of 'security interest'] is based on § 226.2 (gg) of the current regulation, but is *much narrower*. The revised definition lists a number of interests *that have been considered security interests under the current regulation but no longer will be* . . . ." 46 Fed. Reg. 20853 (1981) (emphasis added).

plain language. *Ante*, at 218–219. But the postenactment pronouncements of individual legislators purporting to construe an earlier statute have little, if any, weight in the judicial construction of the statute. *E. g., Quern* v. *Mandley*, 436 U. S. 725, 736, n. 10. And according any weight to the pronouncements of a single legislator is particularly unjustified when the legislator, like Senator Garn in this case, was not even a Member of Congress when the law was enacted. *United States* v. *Mine Workers*, 330 U. S. 258, 281–282.[10]

The Court believes that requiring disclosure of an assignment of unearned insurance premiums on the face of the credit contract would be a gratuitous "informational overload" of no significant benefit to the consumer. *Ante*, at 223. But when the statute and regulation governing the transaction speak unambiguously to the contrary, any independent judgment about the psychology and economics of consumer credit is not for the Court to make.[11]

I respectfully dissent.

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[10] There are other reasons why Senator Garn's statement merits little weight. First, the statement was written and inserted in the Congressional Record, rather than made on the floor of the Senate. Second, Senator Garn's opinion is not reflected in the Report of the Committee, of which he was a member.

[11] Indeed, even were it appropriate for the Court to proffer its own view about the practical necessity of a particular credit disclosure, the Court's view is at least questionable. Disclosing an assignment of unearned insurance premiums might be of considerable interest to the credit-shopping consumer. See n. 3, *supra*. And far from creating an "informational overload," such a disclosure could result in replacing convoluted assignment language, such as that on the back of the contract in this case, with a simple statement that "the buyer gives the creditor an interest in the vehicle and in all insurance charges," such as the statement Ford, in response to the nationwide litigation over this issue, now includes on the face of its contracts.

AMERICAN EXPRESS CO. *v.* KOERNER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-202. Argued April 20, 1981—Decided June 8, 1981

Section 161 (a) of the Truth in Lending Act (TILA), as added by the Fair Credit Billing Act, provides that whenever a creditor sends an obligor a statement of the obligor's account "in connection with an extension of consumer credit" and the obligor believes that the statement contains a billing error, the obligor may send the creditor a written notice. If such a notice is sent, the creditor then must acknowledge receipt of it, investigate the matter, and either correct the account or send a written explanation of its belief that the original statement was correct. Section 103 (h) of the TILA provides that the adjective "consumer," used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended "is a natural person" and the money, property, or services which are the subject of the transaction are "primarily for personal, family, household, or agricultural purposes." A corporation of which respondent is an officer applied to petitioner for a "company account" designed for business customers and asked petitioner to issue credit cards to respondent and other officers. Respondent was required to sign a "company account" form, agreeing to be jointly and severally liable with the company for all charges incurred through use of the card issued to him. Cards were issued on the company's credit rating. A dispute arose between the company and petitioner with respect to charges for flight insurance for certain business trips made by company employees and for renewal of cards that the company claimed were no longer desired, and the company refused to pay the amount in dispute. Company officers wrote to petitioner several times about this, but it does not appear that petitioner ever responded. Subsequently, when respondent attempted to use his company card, he was informed that the account had been canceled because of delinquency in payment. Respondent then filed an action in Federal District Court, alleging, *inter alia*, that petitioner had canceled the account because of respondent's company's refusal to pay the disputed charges, and seeking damages for petitioner's failure to comply with § 161 (a). The District Court granted summary judgment for petitioner, holding that § 161 (a) did

not apply to an account opened in the name of a corporation in reliance on the corporation's credit. The Court of Appeals reversed.

Held: Section 161 (a) is not applicable to the dispute between these parties, and hence petitioner was not required to follow the procedures mandated by § 161 (a). The threshold requirement of § 161 (a)—an "extension of consumer credit"—was not satisfied. The company account was not covered by § 103 (h)'s definition of "consumer," because it was opened primarily for business purposes and not "primarily for personal, family, household, or agricultural purposes." Similarly, the transactions giving rise to the billing dispute cannot be characterized as extensions of consumer credit, since they were business transactions. Pp. 240–246.

615 F. 2d 191, reversed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Ronald J. Greene argued the cause for petitioner. With him on the briefs were *Arnold M. Lerman* and *Peter Frank Liberto.*

Louis R. Koerner, Jr., argued the cause and filed a brief for respondent.

JUSTICE BLACKMUN delivered the opinion of the Court.

The question presented is whether a creditor must follow the requirements specified in 1974 by the Fair Credit Billing Act, Pub. L. 93–495, Tit. III, 88 Stat. 1511, for the correction of billing errors, when both a corporation and an individual officer are liable for a debt.

I

The Fair Credit Billing Act added a number of provisions to the Truth in Lending Act (TILA), Pub. L. 90–321, Tit. I, 82 Stat. 146. A primary provision, and the one at issue in this case, is § 161 (a), as so added. 88 Stat. 1512, 15 U. S. C. § 1666 (a).[1] This section applies whenever a creditor trans-

[1] Section 161 (a) provides:

"If a creditor, within sixty days after having transmitted to an obligor a statement of the obligor's account in connection with an extension of

mits to an obligor "a statement of the obligor's account in connection with an extension of consumer credit." If the

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consumer credit, receives at the address disclosed under section 127 (b)(11) a written notice (other than a notice on a payment stub or other payment medium supplied by the creditor if the creditor so stipulates with the disclosure required under section 127 (a)(8)) from the obligor in which the obligor—

"(1) sets forth or otherwise enables the creditor to identify the name and account number (if any) of the obligor,

"(2) indicates the obligor's belief that the statement contains a billing error and the amount of such billing error, and

"(3) sets forth the reasons for the obligor's belief (to the extent applicable) that the statement contains a billing error,

the creditor shall, unless the obligor has, after giving such written notice and before the expiration of the time limits herein specified, agreed that the statement was correct—

"(A) not later than thirty days after the receipt of the notice, send a written acknowledgement thereof to the obligor, unless the action required in subparagraph (B) is taken within such thirty-day period, and

"(B) not later than two complete billing cycles of the creditor (in no event later than ninety days) after the receipt of the notice and prior to taking any action to collect the amount, or any part thereof, indicated by the obligor under paragraph (2) either—

"(i) make appropriate corrections in the account of the obligor, including the crediting of any finance charges on amounts erroneously billed, and transmit to the obligor a notification of such corrections and the creditor's explanation of any change in the amount indicated by the obligor under paragraph (2) and, if any such change is made and the obligor so requests, copies of documentary evidence of the obligor's indebtedness; or

"(ii) send a written explanation or clarification to the obligor, after having conducted an investigation, setting forth to the extent applicable the reasons why the creditor believes the account of the obligor was correctly shown in the statement and, upon request of the obligor, provide copies of documentary evidence of the obligor's indebtedness. In the case of a billing error where the obligor alleges that the creditor's billing statement reflects goods not delivered to the obligor or his designee in accordance with the agreement made at the time of the transaction, a creditor may not construe such amount to be correctly shown unless he determines that such goods were actually delivered, mailed, or otherwise

obligor believes that the statement contains a billing error,[2] he then may send the creditor a written notice setting forth that belief, indicating the amount of the error and the reasons supporting his belief that it is an error. If the creditor receives this notice within 60 days of transmitting the statement of account, § 161 (a) imposes two separate obligations upon the creditor. Within 30 days, it must send a written acknowledgment that it has received the notice. And, within 90 days

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sent to the obligor and provides the obligor with a statement of such determination.

After complying with the provisions of this subsection with respect to an alleged billing error, a creditor has no further responsibility under this section if the obligor continues to make substantially the same allegation with respect to such error."

[2] "Billing error" is defined in § 161 (b), 88 Stat. 1513, 15 U. S. C. § 1666 (b):

"For the purpose of this section, a 'billing error' consists of any of the following:

"(1) A reflection on a statement of an extension of credit which was not made to the obligor or, if made, was not in the amount reflected on such statement.

"(2) A reflection on a statement of an extension of credit for which the obligor requests additional clarification including documentary evidence thereof.

"(3) A reflection on a statement of goods or services not accepted by the obligor or his designee or not delivered to the obligor or his designee in accordance with the agreement made at the time of a transaction.

"(4) The creditor's failure to reflect properly on a statement a payment made by the obligor or a credit issued to the obligor.

"(5) A computation error or similar error of an accounting nature of the creditor on a statement.

"(6) Any other error described in regulations of the Board."

Like many other provisions of the TILA, § 161 (b) was amended in 1980 by the Truth in Lending Simplification and Reform Act, Pub. L. 96-221, Tit. VI, 94 Stat. 168. Because the effective date of these amendments is April 1, 1982, see § 625 (a) of the 1980 Act, 94 Stat. 185, and because the changes made in the TILA by these amendments are of no consequence to the issue presented by the present case, we cite only the currently effective provisions of the TILA throughout this opinion.

or two complete billing cycles, whichever is shorter, the creditor must investigate the matter and either make appropriate corrections in the obligor's account or send a written explanation of its belief that the original statement sent to the obligor was correct. The creditor must send its explanation before making any attempt to collect the disputed amount.

A creditor that fails to comply with § 161 (a) forfeits its right to collect the first $50 of the disputed amount including finance charges. § 161 (e), 15 U. S. C. § 1666 (e). In addition, § 161 (d) provides that, pursuant to regulations of the Federal Reserve Board, a creditor operating an "open end consumer credit plan" may not restrict or close an account due to an obligor's failure to pay a disputed amount until the creditor has sent the written explanation required by § 161 (a).

Every creditor under an "open end consumer credit plan" must disclose the protections available under § 161 to the obligor. This disclosure must occur at the time the account is opened and at semiannual intervals thereafter. See § 127 (a)(8), 15 U. S. C. § 1637 (a)(8).

II

This case presents a dispute over the applicability of § 161. The relevant facts, as the District Court noted, are largely undisputed. On November 16, 1965, prior to the enactment of the TILA, John E. Koerner & Co., Inc., applied for a credit card account with petitioner American Express Company. The application was for a "company account" designed for business customers. App. 27a. The Koerner Company asked American Express to issue cards bearing the company's name to respondent Louis R. Koerner, Sr., and four other officers of the corporation. Respondent was required to sign a "company account" form, agreeing that he would be jointly and severally liable with the company for all charges incurred through the use of the company card that was issued to him. *Id.*, at 28a. American Express, before issuing the cards, in-

vestigated the company's credit rating, but not that of respondent or the other officers.

American Express billed the Koerner Company for all charges arising from the use of the five cards issued for the company account. It sent a monthly statement showing the total due and listing individual subtotals for each of the five users. Although respondent employed his card mostly for business-related expenses, he used it occasionally for personal expenses. When he did so, he paid for these items by sending his personal check to American Express. Charges for his business-related expenses were paid by the company.

In 1975, a dispute arose between the Koerner Company and American Express concerning charges that appeared on the company account. American Express had billed the company for flight insurance for three business trips made by company employees, and for renewal fees for two of the cards that the company claimed were no longer desired. The total amount in dispute, which the company refused to pay, was $55. Company officials wrote to American Express several times about this. The record does not indicate that American Express responded in any way prior to November 1976.[2]

On September 28, 1976, respondent attempted to use his card to purchase a plane ticket for a business trip. After getting in touch with American Express, the ticket agent requested that respondent speak by telephone with an American Express employee. This employee informed respondent that the account was canceled because of delinquency in payment. She instructed the ticket agent to cut respondent's card in two and return it to him.

Shortly thereafter, respondent filed this action in the United States District Court for the Eastern District of Louisiana. He alleged that American Express had canceled the

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[2] Although the record is unclear, American Express apparently credited the account in the amount of $54.45 on November 26, 1976, leaving a balance of 55 cents. App. 41a.

account because of the Koerner Company's refusal to pay the disputed charges and in retaliation for the many complaints that had been made by the company in its attempt to resolve the dispute. Jurisdiction was based upon § 130 of the TILA, 15 U. S. C. § 1640, which provides for the recovery of actual damages sustained by any person as the result of a creditor's failure to comply with various provisions of the TILA, including § 161, and grants jurisdiction of such actions to the federal district courts. The complaint sought damages of $25,000 for "inconvenience, mental anguish, grief, aggravation, and humiliation." App. 20a.[4] Respondent, invoking diversity jurisdiction, also sought damages under Louisiana law.

The District Court granted American Express' motion for summary judgment. 444 F. Supp. 334 (1977). It held that both § 161, which applies only to "an extension of consumer credit," and § 104 (1), 15 U. S. C. § 1603 (1), which exempts "[c]redit transactions involving extensions of credit for business or commercial purposes" from most of the provisions of the TILA,[5] required the conclusion that the procedures established by § 161 do not apply to an account opened in the

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[4] Respondent also sought to represent a class composed of persons and organizations who held American Express cards or would do so in the future, and a subclass composed of all those cardholders who had attempted to utilize the provisions of § 161 and had been injured by American Express' violations of that section. On behalf of these classes, he sought injunctive relief and damages. Respondent, however, did not obtain certification of a class pursuant to Federal Rule of Civil Procedure 23 (c) prior to the District Court's decision.

[5] By § 135 of the TILA, as added by Pub. L. 93-495, § 410 (a), 88 Stat. 1519, 15 U. S. C. § 1645, Congress provided that the business purpose exemption in § 104 (1) is generally not applicable to § 132, 15 U. S. C. § 1642 (prohibiting the issuance of unsolicited credit cards), to § 133, 15 U. S. C. § 1643 (limiting a cardholder's liability for unauthorized use of a card to $50), and to § 134, 15 U. S. C. § 1644 (imposing criminal penalties for various offenses involving credit cards).

name of a corporation in reliance upon the corporation's credit.[6]

The United States Court of Appeals for the Fifth Circuit reversed. 615 F. 2d 191 (1980). Noting that respondent was jointly and severally liable with the company for all debts incurred by his use of the card, the court concluded: "If [American Express] can recover from a consumer, then it must abide by the requirements of [§ 161] for correction of billing errors in a consumer's credit card statement. The credit card company cannot have it both ways . . . ." *Id.*, at 195.

Because of the significance of the issue in the enforcement of the TILA, we granted certiorari. 449 U. S. 1076 (1981).

III

The threshold inquiry under § 161 (a) is whether the creditor has transmitted to an obligor "a statement of the obligor's account in connection with an extension of consumer credit." If there has been no extension of "consumer credit," the section imposes no obligation upon a creditor, and the creditor is free to adopt its own procedures for responding to a customer's complaint about a billing error. We conclude that, on the undisputed facts of this case, respondent has failed to show that American Express has extended him "consumer credit" in any relevant transaction. Section 161 (a), therefore, is not applicable to the dispute between these parties.[7]

In order for there to be an extension of consumer credit,

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[6] Respondent conceded that his claims under state law, for which he had invoked diversity jurisdiction, did not satisfy the amount-in-controversy requirement of 28 U. S. C. § 1332. See 444 F. Supp., at 335, n. 1, and 342.

[7] In view of our reliance upon § 161 (a)'s use of the term "consumer credit," we have no occasion to address petitioner's broader argument that all the provisions of the TILA, except those mentioned in § 135, 15 U. S. C. § 1645, are inapplicable to the Koerner Company's account because of the exemption for credit extended for business or commercial purposes contained in § 104 (1), 15 U. S. C. § 1603 (1).

there first must be an extension of "credit." The TILA's definition of "credit" is contained in § 103 (e), 15 U. S. C. § 1602 (e): "The term 'credit' means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." [8] Thus, a credit card company such as American Express extends credit to an individual or an organization when it opens or renews an account, as well as when the cardholder actually uses the credit card to make purchases. When the account is opened or renewed, the creditor has granted a right "to incur debt and defer its payment"; when the card is used, the creditor has allowed the cardholder "to defer payment of debt."

An extension of credit is an extension of "consumer credit" if the conditions specified in the statute's definition of "consumer" are also satisfied. Section 103 (h) of the TILA, 15 U. S. C. § 1602 (h), defines "consumer" as follows:

> "The adjective 'consumer,' used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes."

Two elements thus must be present in every "consumer credit" transaction: the party to whom the credit is extended must be a natural person, *and* the money, property, or services received by that person must be "primarily for personal, family, household, or agricultural purposes." [9] We therefore conclude that the Court of Appeals erred in holding respondent to be a "consumer" without deciding whether American

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[8] It is undisputed that American Express is a "creditor," as defined in § 103 (f) of the TILA, 15 U. S. C. § 1602 (f). The term "debtor" is not defined in the Act, but American Express does not contend that respondent is not a "debtor."

[9] We hereinafter use the phrase "consumer purposes" as the equivalent of "personal, family, household, or agricultural purposes."

Express had extended him credit primarily for any of the purposes specified in § 103 (h). If it had considered this issue, the only permissible conclusion for it to reach would have been that the undisputed facts of this case establish that the threshold requirement of § 161 (a)—an "extension of consumer credit"—has not been satisfied because none of the credit transactions relevant to the billing dispute was entered into "primarily" for consumer purposes.

The language of § 161 (a) does not distinguish between the two types of transactions included in the definition of "credit" or indicate which of them must satisfy the definition of "consumer" in order for the section to be applicable. There are several possibilities. The relevant extension of credit may be only the creation or renewal of the account. Under this view, adopted by the District Court, 444 F. Supp., at 340, if an account is opened by a natural person, its overall purpose must be considered. If the account is opened primarily for consumer purposes, § 161 (a) applies, even if the cardholder uses the card for an occasional nonconsumer purchase. On the other hand, the language might be interpreted to call for a transaction-by-transaction approach. With such an approach, § 161 would apply if the transaction that is the subject of the dispute is a consumer credit transaction, regardless of the overall purpose of the account. A third alternative would be to combine the two approaches by holding § 161 applicable to all disputes that arise under an account that is characterized as a consumer credit account as well as to any dispute concerning an individual transaction that is an extension of consumer credit, even if the overall purpose of the account is primarily a business one.

We need not choose among these alternatives in order to decide this case,[10] for we find that respondent is unable to

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[10] It is clear that some consideration of the overall purposes of a credit card account, not merely of individual transactions, is necessary under § 161. For example, the application of § 161 (a) to some of the billing

succeed under any of them. The undisputed facts of this case reveal that the Koerner Company obtained the right "to incur debt and defer its payment" from American Express

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errors specified in § 161 (b) is possible only when the credit card account itself is classified as an extension of consumer credit. This is because these errors (charges for extensions of credit that never were made, failure to reflect payments made by the obligor, and errors in computation) do not arise from a particular use of a credit card. Furthermore, provisions such as § 161 (d), which prohibits a creditor that operates "an open end consumer credit *plan*" (emphasis added) from closing or restricting an account unless it has complied with § 161 (a), and § 127 (a)(8), which requires creditors to disclose the protections available under § 161 (a) "[b]efore opening any account under an open end consumer credit *plan*" (emphasis added), as well as twice a year after the account is opened, clearly are applicable only if the account itself (the "plan") is an extension of consumer credit.

We are hesitant, however, to preclude completely the possibility of a transaction-by-transaction approach to § 161 (a). Regulation Z of the Federal Reserve Board includes detailed rules applying § 161 (a), and the regulation is entitled to substantial deference. *Anderson Bros. Ford* v. *Valencia, ante,* at 219; *Ford Motor Credit Co.* v. *Milhollin,* 444 U. S. 555 (1980); *Mourning* v. *Family Publications Service, Inc.,* 411 U. S. 356 (1973). The scope of the rules implementing § 161 is stated in 12 CFR § 226.14 (g) (1980):

"This section does not apply to credit other than open end [a term defined to include only consumer credit, see 12 CFR § 226.2 (x) (1980)], whether or not a periodic statement is mailed or delivered, unless it is consumer credit extended on an account by use of a credit card."

The reference to "consumer credit extended on an account by use of a credit card" seems to indicate that a dispute concerning any transaction involving the use of a credit card by a natural person for consumer purposes may be subject to the requirements of § 161 (a).

We are aware that the Federal Reserve Board recently has promulgated a complete revision of Regulation Z, 46 Fed. Reg. 20847 (Apr. 7, 1981), and that the statement accompanying the revision indicates that "cards issued for non-consumer credit purposes are covered only by the provisions regarding credit card issuance and liability." *Id.,* at 20850. See also 45 Fed. Reg. 80648, 80651 (1980) (statement accompanying the proposed rules) ("[W]hen a card is issued for business purposes, the fact that an individual uses it for consumer purposes does not subject the card issuer to the provisions on periodic statements, billing error resolution, and other

primarily for business, not consumer, purposes. In addition, the specific transactions that were the subject of the dispute between the company and American Express also were business transactions. The facts of this case, therefore, are not encompassed within any possible interpretation of the phrase "extension of consumer credit" in § 161 (a).

The overall purpose of the Koerner Company's account is clear, and respondent has not claimed that the company sought its account with American Express primarily for consumer purposes. Rather, the company applied for a "company account" using a form supplied by American Express for such an account. App. 27a. Respondent's separate application for a supplementary credit card for the same account also was submitted on a company account form. *Id.*, at 28a. The only credit references submitted to American Express on these forms were those of the Koerner Company, and respondent has admitted that the account was billed to the Koerner Company as a business account. *Id.*, at 25a and 30a. We agree with the District Court that this evidence is sufficient to indicate that the account was opened primarily for business or commercial purposes. See 444 F. Supp., at 340. The evidence submitted by respondent does not weaken this conclusion. In fact, it confirms it. Respondent admitted that he used the card mostly for business purposes.[11] His answers to petitioner's interrogatories identified no more than seven nonbusiness uses of the card between 1972 and 1976. App. 42a–43a.[12]

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consumer protections"). For the reasons stated in the text, however, we need not decide whether the 1981 revision applies retroactively to this case, whether it conflicts with the earlier version of the regulations, or whether it is valid if it does conflict. Regardless of how we were to answer these questions, respondent cannot succeed on the merits.

[11] Memorandum in Support of Plaintiff's Motion for New Hearing and to Alter or Amend Judgment and/or for New Trial 1–2, Record 158–159.

[12] American Express included the billing records of the account for the period June 1975 to August 1976 (excluding February 1976), as Exhibit

We do not suggest that it always will be easy to determine whether the opening of a credit account involves an extension of consumer credit. The Court of Appeals noted that often it is difficult to characterize the overall purpose of a credit card account that allows for a large number of individual transactions. 615 F. 2d, at 195.[13] It is clear, however, that the Fair Credit Billing Act requires creditors and the courts to undertake this task. See n. 10, *supra*. On this record, there can be no dispute that the Koerner Company's account was not covered by § 103 (h)'s definition of "consumer," because it was not opened "primarily for personal, family, household, or agricultural purposes."

Similarly, the transactions that were the subject of the underlying dispute cannot be characterized as extensions of consumer credit. These transactions involved either charges for flight insurance added to the cost of airline tickets purchased with the Koerner Company's American Express card or charges for the renewal of cards that the company asserted were no longer wanted. None of these charges was an extension of consumer credit. Respondent's answers to interrogatories admitted that the airline tickets were purchased for business trips. App. 41a–42a. The renewal charges could be considered charges for an extension of consumer credit only if the overall purposes of the account were consumer purposes. As we already have seen, respondent has provided no evidence indicating that this was so.

Inasmuch as the record establishes that there was no dispute between petitioner and respondent concerning "a statement of [respondent's] account in connection with an ex-

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3 to its Statement of Uncontested Material Facts, submitted with its Motion for Summary Judgment, Record Item No. 6. These records reveal that respondent used the card approximately 60 times during this period.

[13] See also *American Airlines, Inc.* v. *Remis Industries, Inc.*, 494 F. 2d 196, 201 (CA2 1974); *Credit Card Service Corp.* v. *FTC*, 161 U. S. App. D. C. 424, 428, 495 F. 2d 1004, 1008 (1974).

tension of consumer credit," petitioner was not required to follow the procedures mandated by § 161 (a).

IV

Because Congress has restricted the operation of § 161 (a) to disputes concerning extensions of consumer credit, and because the dispute between American Express and respondent did not concern an extension of consumer credit, the judgment of the Court of Appeals must be, and is, reversed.

It is so ordered.

Syllabus

ROWAN COS., INC. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-780. Argued April 21, 1981—Decided June 8, 1981

Petitioner, for its own convenience, provided meals and lodging to its employees working on offshore oil rigs. Petitioner did not include the value of the meals and lodging in computing the employees' "wages" for the purpose of paying taxes under the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA) or withholding the employees' federal income taxes. Upon audit, the Internal Revenue Service included the value of the meals and lodging in the employees' "wages" for FICA and FUTA but not for income-tax withholding. In doing so, the IRS acted consistently with Treasury Regulations that interpret the definition of "wages" in FICA and FUTA to include the value of such meals and lodging, whereas the substantially identical definition of "wages" in the income-tax withholding provisions is interpreted by Treasury Regulations to exclude this value. Petitioner paid the additional assessment for FICA and FUTA taxes and brought suit in Federal District Court for a refund. The District Court granted summary judgment for the Government, and the Court of Appeals affirmed, holding that the different interpretations of the definition of "wages" was justified by the different purposes of FICA and FUTA, on the one hand, and income-tax withholding, on the other.

Held: The Treasury Regulations interpreting the definition of "wages" in FICA and FUTA to include the value of the meals and lodging are invalid, for they fail to implement the statutory definition in a consistent or reasonable manner. The plain language and legislative histories of the relevant statutes indicate that Congress intended its definition of "wages" to be interpreted in the same manner for FICA and FUTA as for income-tax withholding. Pp. 250-263.

624 F. 2d 701, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 263.

K. Martin Worthy argued the cause for petitioner. With

him on the briefs were *Michael C. Durney* and *Elmer H. Theis.*

Stuart A. Smith argued the cause for the United States. With him on the brief were *Solicitor General McCree, Acting Assistant Attorney General Murray, Leonard J. Henzke, Jr.,* and *Stanley S. Shaw, Jr.**

JUSTICE POWELL delivered the opinion of the Court.

This case concerns the federal taxes imposed upon employers by the Federal Insurance Contributions Act (FICA), 26 U. S. C. § 3101 *et seq.*, and the Federal Unemployment Tax Act (FUTA), 26 U. S. C. § 3301 *et seq.* The question is whether petitioner should have included in the computation of "wages," which is the base for taxation under FICA and FUTA, the value of meals and lodging provided for its own convenience to employees working on offshore oil rigs.

I

During the tax years in question, 1967–1969, petitioner Rowan Companies, Inc., owned and operated rigs for drilling oil and gas wells, both on land and offshore. Some of petitioner's offshore rigs were located as many as 60 miles from land. It cost petitioner less and was more convenient to provide meals and lodging to employees at these rigs than to transport the employees to and from the rigs for each work shift.[1] Employees worked at these rigs for 10-day tours of duty, and petitioner then transported them back to land for

*Briefs of *amici curiae* urging reversal were filed by *Roger J. Marzulla* and *Maxwell A. Miller* for Kim Aspatore et al.; by *Thomas W. Power* and *Robert D. McDonald* for the Foodservice and Lodging Institute; and by *Lawrence Gerber* for the Young Men's Christian Association of Metropolitan Hartford, Inc.

[1] It cost petitioner about $6 per day, per man to engage a caterer who provided meals and maintained living quarters on a vessel moored alongside the drilling rig. It would have cost petitioner about $25 per man to have transported the crews to and from land for each work shift.

5-day periods of leave. All employees at a rig received the same meals and lodging facilities, regardless of employment status or pay. Employees did not receive any cash allowance if they chose not to eat a meal. Petitioner did not provide meals or lodging to employees during their leave; nor did it provide meals or lodging to employees working on land-based rigs.

Petitioner did not include the value of the meals and lodging in computing its employees' "wages" for the purpose of paying taxes under FICA or FUTA.[2] Nor did petitioner include this value in computing "wages" for the purpose of withholding its employees' federal income tax under 26 U. S. C. § 3402 (a).[3] Its uniform practice appeared to be consistent with the statutory language, as Congress defined "wages" in substantially identical language for each of these three obligations upon employers.[4] Upon audit, however, the Internal Revenue Service included the fair value of the meals

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[2] FICA imposes "on every employer an excise tax, with respect to having individuals in his employ, equal to [specified] percentages of the wages . . . paid by him with respect to employment." 26 U. S. C. § 3111. FICA also imposes a tax upon employees, based upon "wages." § 3101 (a). These taxes fund the Social Security programs. FUTA imposes upon certain employers "an excise tax, with respect to having individuals in [their] employ, equal to [specified percentages] of the total wages . . . paid by [them] during the calendar year with respect to employment." § 3301 (1970 ed.). This tax funds the federal component of a cooperative federal-state program of unemployment insurance.

[3] Section 3402 (a) provides that "every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables prescribed by the Secretary."

[4] Congress defined "wages" identically in FICA and FUTA, as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash." §§ 3121 (a) (FICA), 3306 (b) (FUTA). For the purpose of income-tax withholding, Congress defined "wages" as "all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash." § 3401 (a).

and lodging in the employees' "wages" for the purpose of FICA and FUTA, but not for the purpose of income-tax withholding under § 3402 (a). The Service acted consistently with the present Treasury Regulations that interpret the definition of "wages" in FICA and FUTA to include the value of these meals and lodging,[5] whereas the substantially identical definition of "wages" in § 3401 (a) is interpreted by Treasury Regulations to exclude this value. Compare Treas. Reg. §§ 31.3121 (a)–1 (e), (f) (FICA), 26 CFR §§ 31.3121 (a)–1 (e), (f) (1980); Treas. Reg. §§ 31.3306 (b)–1 (e), (f) (FUTA), 26 CFR §§ 31.3306 (b)–1 (e), (f) (1980); with Treas. Reg. §§ 31.3401 (a)–1 (b)(9), (10) (income-tax withholding), 26 CFR §§ 31.3401 (a)–1 (b)(9), (10) (1980). Petitioner paid the additional assessment and brought this suit for a refund under 28 U. S. C. § 1346 (a)(1).[6]

The District Court for the Southern District of Texas granted the Government's motion for summary judgment. The Court of Appeals for the Fifth Circuit affirmed, expressing the view that the different interpretations of the definition of "wages" are justified by the different purposes of FICA and FUTA, on the one hand, and income-tax withholding, on the other. 624 F. 2d 701, 707 (1980). We granted a writ of certiorari, 449 U. S. 1109 (1981), because the Court of Appeals' decision conflicts with the decisions of other Courts of Appeals.[7] We now reverse.

II

The Government acknowledges that petitioner properly excluded the value of the meals and lodging in computing the "wages" from which it withheld employees' income tax under

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[5] See n. 9, *infra*.

[6] The additional assessment totaled $35,198.46, plus interest.

[7] See *Oscar Mayer & Co.* v. *United States*, 623 F. 2d 1223 (CA7 1980); *Hotel Conquistador, Inc.* v. *United States*, 220 Ct. Cl. 20, 597 F. 2d 1348 (1979), cert. denied, 444 U. S. 1032 (1980).

§ 3402 (a). Under the Treasury Regulation interpreting the definition of "wages" for income-tax withholding, the employer excludes the value of meals or lodging from "wages" if the employee excludes the value from his gross income. Treas. Reg. § 31.3401 (a)–1 (b)(9), 26 CFR § 31.3401 (a)–1 (b)(9) (1980). Under the convenience-of-the-employer rule, an employee may exclude from gross income the value of meals and lodging furnished to him by his employer if the employer furnished both the meals and lodging for its own convenience, furnished the meals on its business premises, and required the employee to accept the lodging on the business premises as a condition of employment. 26 U. S. C. § 119 (1976 ed., Supp. III).[8] Petitioner's provision of meals and lodging to employees on its offshore rigs satisfied each of these § 119 requirements. The value of the meals and lodging therefore was excludable by the employer from "wages" under Treas. Reg. § 31.3401 (a)–1 (b)(9), 26 CFR § 31.3401 (a)–1 (b)(9) (1980). See generally *Commissioner* v. *Kowalski*, 434 U. S. 77 (1977).

Notwithstanding this acknowledgment, the Government contends that petitioner should have included the value of the meals and lodging in "wages" for purposes of FICA and FUTA. It relies on Treas. Reg. §§ 31.3121 (a)–1 (f)

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[8] Section 119 reads, in pertinent part:

"(a) Meals and lodging furnished to employee, his spouse, and his dependents, pursuant to employment.

"There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him, his spouse, or any of his dependents by or on behalf of his employer for the convenience of the employer, but only if—

"(1) in the case of meals, the meals are furnished on the business premises of the employer, or

"(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment."

(FICA) and 31.3306 (b)–1 (f) (FUTA), 26 CFR §§ 31.3121 (a)–1 (f) and 31.3306 (b)–1 (f) (1980), that provide:

> "Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called 'courtesy' discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term 'facilities or privileges,' however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees."

If valid, these regulations dictate that the value of the meals and lodging provided by petitioner to its employees on offshore rigs was includable in "wages" as defined in FICA and FUTA, even though excludable from "wages" under the substantially identical definition in § 3401 (a) for income-tax withholding.[9]

We consider Treasury Regulations valid if they "implement the congressional mandate in some reasonable manner." *United States* v. *Correll*, 389 U. S. 299, 307 (1967); accord, *Commissioner* v. *Portland Cement Co. of Utah*, 450 U. S. 156,

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[9] The Court of Appeals assumed, without explicitly holding, that the meals and lodging provided by petitioner fall within Treas. Reg. §§ 31.3121 (a)–1 (f) and 31.3306 (b)–1 (f), 26 CFR §§ 31.3121 (a)–1 (f) and 31.3306 (b)–1 (f) (1980), if those regulations are valid. Petitioner did not question this assumption in its petition for writ of certiorari, although its reply brief on the merits disputed the Government's assertion that these regulations govern this case if valid. Reply Brief for Petitioner 3, n. 6. We accept the Government's assertion for the purposes of this opinion.

169 (1981). In *National Muffler Dealers Assn.* v. *United States*, 440 U. S. 472, 477 (1979), we stated: "In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose." Harmony between statutory language and regulation is particularly significant in this case. Congress itself defined the word at issue—"wages"—and the Commissioner interpreted Congress' definition only under his general authority to "prescribe all needful rules." 26 U. S. C. § 7805 (a). Because we therefore can measure the Commissioner's interpretation against a specific provision in the Code, we owe the interpretation less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision. Compare *Commissioner* v. *Portland Cement Co. of Utah*, *supra*, at 165; *Fulman* v. *United States*, 434 U. S. 528, 533 (1978); *Batterton* v. *Francis*, 432 U. S. 416, 424–425, and nn. 8–9 (1977). Where the Commissioner acts under specific authority, our primary inquiry is whether the interpretation or method is within the delegation of authority.

Among other considerations relevant to the validity of Treasury Regulations, we inquire whether the regulation "is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent," *National Muffler Dealers Assn.* v. *United States*, 440 U. S., at 477; and "[i]f the regulation dates from a later period, the manner in which it evolved merits inquiry." *Ibid.* We also consider, if pertinent, "the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute." *Ibid.* In this case, we hold that Treas. Reg. §§ 31.3121 (a)–1 (f) and 31.3306 (b)–1 (f) are invalid, for they fail to implement the congressional mandate in a consistent and reasonable manner.

A

Congress chose "wages" as the base for measuring employers' obligations under FICA, FUTA, and income-tax withholding. In *Central Illinois Public Service Co.* v. *United States*, 435 U. S. 21 (1978), we considered Congress' use of the concepts of "income" and "wages" for the purpose of income-tax withholding. The question was whether an employer should have included in "wages" for income-tax withholding the reimbursements it had given employees for lunch expenses on company travel that had not required overnight stays. We held that the employer was not required to include the reimbursements in "wages," even though the reimbursements constituted "income" to the employees.[10] This holding relied on the recognition that "[t]he two concepts—income and wages—obviously are not necessarily the same. Wages usually are income, but many items qualify as income and yet clearly are not wages." *Id.*, at 25 (footnote omitted). In short, "wages" is a narrower concept than "income," see *ibid.*, and the fact that the reimbursements were "income" to the employees did not necessarily mean that the employer had to include them in "wages" for income-tax withholding.

Petitioner contends that its position in this case follows from our reasoning in *Central Illinois*. Because "wages" is a narrower concept than "income" for the purposes of income-tax withholding, it is argued that the value of the meals and lodging in this case—which the Government acknowledges is not "income"—therefore cannot be "wages" under FICA and FUTA. Petitioner's argument rests on the assumption that Congress intended the term "wages" to have

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[10] The convenience-of-the-employer rule was not implicated in determining whether these reimbursements constituted "income" because the requirements of that rule were not present. See n. 8, *supra*. The treatment of the reimbursements for income taxation was governed by § 162 (a)(2), 26 U. S. C. § 162 (a)(2), which allows a deduction for certain traveling expenses.

the same meaning for purposes of FICA, FUTA, and income-tax withholding. We now consider whether petitioner's assumption is correct.

B

Congress enacted the predecessor provisions of FICA and FUTA as Titles VIII and IX of the Social Security Act of 1935, ch. 531, 49 Stat. 636, 639. It chose "wages" as the base for taxation of employers, § 804, 49 Stat. 637; § 901, 49 Stat. 639, and it defined "wages." § 811 (a), 49 Stat. 639; § 907 (b), 49 Stat. 642. Congress originated the present income-tax withholding system in § 172 of the Revenue Act of 1942, 56 Stat. 884. See *Central Illinois Public Service Co.* v. *United States, supra,* at 26–27. It again chose "wages" as the base, 56 Stat. 888, and defined "wages" in substantially the same language that it used in FICA and FUTA, *id.,* at 887. When Congress revised the withholding system by replacing § 172 with the Current Tax Payment Act of 1943, 57 Stat. 126, it retained the definition of "wages." *Ibid.* In view of this sequence of consistency, the plain language of the statutes is strong evidence that Congress intended "wages" to mean the same thing under FICA, FUTA, and income-tax withholding.

The legislative histories of the Acts establishing income-tax withholding support the conclusion to be drawn from the plain language. These histories reveal a congressional concern for "the interest of simplicity and ease of administration." S. Rep. No. 1631, 77th Cong., 2d Sess., 165 (1942) (Revenue Act of 1942). See *Central Illinois Public Service Co.* v. *United States, supra,* at 31. They also reveal that one of the means Congress chose in order to promote simplicity was to base withholding upon the same measure—"wages"—as taxation under FICA and FUTA. Thus, whereas the withholding system proposed by the House provided for withholding upon dividends and bond interest in addition to wages, H. R. Rep. No. 2333, 77th Cong., 2d Sess.,

125 (1942), the system proposed by the Senate and enacted in § 172 limited withholding to wages. S. Rep. No. 1631, *supra*, at 165. "This was a standard that was intentionally narrow and precise." *Central Illinois Public Service Co.* v. *United States*, *supra*, at 31. Section 172 also specified that remuneration for certain services was excepted from "wages." According to the Senate Report, "[t]hese exceptions [for income-tax withholding] are identical with the exceptions extended to such services for Social Security tax purposes and are intended to receive the same construction and have the same scope." S. Rep. No. 1631, *supra*, at 166.

When Congress replaced § 172, the House devoted much attention to the specified exceptions from "wages," H. R. Rep. No. 268, 78th Cong., 1st Sess., pt. 1, p. 14 (1943); H. R. Rep. No. 401, 78th Cong., 1st Sess., pt. 1, pp. 22–23 (1943), but it left the essential definition of "wages" unchanged. H. R. Rep. No. 268, *supra*, at 14. The Senate modified the bill proposed by the House, and reported: "[T]he methods of collection, payment, and administration of the withholding tax have been coordinated generally with those applicable to the Social Security tax imposed on employees under section 1400 of the code. This proposal has been made in order to facilitate the work of both the Government and the employer in administering the withholding system." S. Rep. No. 221, 78th Cong., 1st Sess., 17 (1943); see also H. R. Conf. Rep. No. 510, 78th Cong., 1st Sess., 28 (1943).[11]

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[11] The Current Tax Payment Act of 1943 moved the income-tax withholding provisions into the same chapter of the Internal Revenue Code of 1939 as contained FICA and FUTA. The Social Security Act Amendments of 1939, 53 Stat. 1360, had incorporated Titles VIII and IX of the Social Security Act of 1935, as amended, into Chapter 9 of the Internal Revenue Code of 1939 as FICA and FUTA. The old-age and disability tax provisions of Title VIII became FICA in Subchapter A of Chapter 9, and the unemployment compensation tax provision of Title IX became FUTA in Subchapter C. Section 172 of the Revenue Act of 1942 had added the income-tax withholding system to Chapter 1 of the Internal

In sum, Congress intended in both the Revenue Act of 1942 and the Current Tax Payment Act of 1943 to coordinate the income-tax withholding system with FICA and FUTA. In both instances, Congress did so to promote simplicity and ease of administration. Contradictory interpretations of substantially identical definitions do not serve that interest. It would be extraordinary for a Congress pursuing this interest to intend, without ever saying so, for identical definitions to be interpreted differently.

Despite the plain language of Congress' definition of "wages" and this legislative history, the Government contends that FICA and FUTA compose a distinct system of taxation to which the rules of income taxation, such as the exclusion of the value of meals and lodging from "income" under the convenience-of-the-employer rule in § 119, do not apply. In support, the Government recites congressional Committee Reports indicating that Congress enacted the Social Security Act to "relieve the existing distress and . . . to reduce destitution and dependency in the future," H. R. Rep. No. 615, 74th Cong., 1st Sess., 3 (1935). See also S. Rep. No. 628, 74th Cong., 1st Sess., 2 (1935). These Reports also state that "[w]ages include not only the cash payments made to the employee for work done, but also compensation for services in any other form, such as room, board, etc." H. R. Rep. No. 615, *supra*, at 32 (Title VIII (FICA)); accord, *id.*, at 36 (Title IX (FUTA)); S. Rep. No. 628, *supra*, at 44 (FICA), 49 (FUTA). The Government concludes that Congress intended to impose the taxes under FICA and FUTA upon a broad range of remuneration in order to accomplish the Act's purposes.

We are not persuaded by this contention. The reference by Congress to "room, board, etc." as examples of "wages" under Titles VIII and IX is ambiguous. It does not neces-

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Revenue Code as §§ 450–476. The Current Tax Payment Act moved this system into Chapter 9 of the Code as §§ 1621–1632.

sarily mean that Congress intended to tax remuneration in kind without regard to principles developed under income taxation, such as the convenience-of-the-employer rule.[12] This rule first appeared in 1919, O. D. 265, 1 Cum. Bull. 71, and was well established by 1935. See *Commissioner* v. *Kowalski*, 434 U. S., at 84–87. There is no evidence in the Committee Reports cited by the Government that Congress intended to exclude this established rule from determinations under Titles VIII and IX or to create a different rule to govern "room, board, etc." We therefore think that the reference in the Committee Reports to "room, board, etc." lends no support to the validity of the Treasury Regulations on which the Government relies.[13]

The Government further contends, however, that a line of Treasury Regulations and rulings unbroken since 1940 refutes petitioner's view that Congress intended a consistent interpretation of the term "wages." It also contends that we may infer congressional endorsement of these Treasury Regulations and rulings from Congress' re-enactment of FICA, FUTA, and the income-tax withholding provisions in the Internal Revenue Code of 1954. We now address these contentions.

C

The history of the Treasury Regulations and rulings interpreting Congress' definition of "wages" in FICA and FUTA

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[12] The inclusion of "room, board, etc." in "wages" under FICA and FUTA is not inconsistent with the application of the convenience-of-the-employer rule in determining "wages." Under the rule, room and board constitute "wages" unless they are provided for the employer's convenience.

[13] It is true that Congress codified the convenience-of-the-employer rule in § 119 of the income-tax provisions of the Code in 1954. But that does not mean that Congress implicitly foreclosed the applicability of the rule to other provisions of the Code. To the contrary, Congress in 1954 retained—and since has left unchanged—the substantially identical definitions of "wages" for all three obligations upon employers; and the rule expressly applies to "wages" under the income-tax withholding provisions. Treas. Reg. § 31.3401 (a)–1 (b) (9), 26 CFR § 31.3401 (a)–1 (b) (9) (1980).

is far from consistent. The Commissioner's contemporaneous construction of Titles VIII (FICA) and IX (FUTA) of the Social Security Act of 1935 was that the convenience-of-the-employer rule applied to the computation of "wages." Treas. Regs. 90, Art. 207 (1936) (Title IX); Treas. Regs. 91, Art. 14 (1936) (Title VIII).[14] Pursuant to Treas. Regs. 90, Art. 207, the Service ruled in 1937 that "supper money" paid to employees working overtime for the convenience of the employer was excludable from "wages" under both Titles. S. S. T. 110, 1937–1 Cum. Bull. 441. Again in 1938, the Service ruled in S. S. T. 302, 1938–1 Cum. Bull. 457, that free lunches provided by an employer for its own convenience were excludable from "wages" under Title IX. See also S. S. T. 383, 1940–1 Cum. Bull. 210–211.

The position taken in the Treasury Regulations and rulings subsequently changed, but without explanation. In 1939, Congress passed the Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1360, that amended some of the specified exclusions from "wages" under FICA and FUTA but left unchanged the definition of "wages." Compare §§ 603, 614, 53 Stat. 1382, 1392, with §§ 1426 (a), 1607 (b), Internal Revenue Code of 1939, 26 U. S. C. §§ 1426 (a), 1607 (b) (1952 ed.). In 1940, however, the Commissioner issued Treas. Regs. 106, § 402.227 (FICA), and Treas. Regs. 107, § 403.227 (FUTA). These Regulations, which were virtually

[14] Treasury Regulations 90, Art. 207, provided that "facilities or privileges (such as entertainment, cafeterias, restaurants, medical services, or so-called 'courtesy' discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for services if such facilities or privileges are offered or furnished by the employer merely as a convenience to the employer or as a means of promoting the health, good will, contentment, or efficiency of his employees." Treasury Regulations 91, Art. 14, differed slightly, in that it did not contain the phrase "as a convenience to the employer," but the Service interpreted it in the same way that it interpreted Treas. Regs. 90, Art. 207. See S. S. T. 302, 1938–1 Cum. Bull. 457.

identical to the present Treasury Regulations at issue in this case, excluded the convenience-of-the-employer rule from the computation of "wages" under FICA and FUTA. No reasons were stated for this change. Pursuant to the new Regulations, the Service ruled in 1940 that the value of meals and lodging furnished to the crew operating a steamship was includable in "wages" under FICA and FUTA. S. S. T. 386, 1940–1 Cum. Bull. 211–212. In 1944, the Commissioner stated in Mim. 5657, 1944 Cum. Bull. 551, that the value of meals and lodging furnished by an employer was includable in "wages," and the Commissioner added without explanation that "[i]t is immaterial, for the purposes of such taxes, whether the quarters or meals are furnished for the convenience of the employer."

The Government contends that the 1940 Regulations and the rulings issued pursuant to them acquired "the effect of law" when Congress re-enacted FICA and FUTA without substantial change in the Internal Revenue Code of 1954. *United States* v. *Correll*, 389 U. S., at 305; *Cammarano* v. *United States*, 358 U. S. 498, 510–511 (1959). In its view, the 1936 Treasury Regulations and the rulings under them were short-lived and therefore are inconsequential. See *National Muffler Dealers Assn.* v. *United States*, 440 U. S., at 485–486.[15]

We are unconvinced. Despite Treas. Regs. 106 and 107 and the rulings issued under them, the rule of S. S. T. 302 issued in 1938—that the value of meals provided for the convenience of the employer is excludable from "wages"—remained in effect until after 1954. In 1957, the Service ruled

[15] The Government also relies on *Pacific American Fisheries, Inc.* v. *United States*, 138 F. 2d 464 (CA9 1943), in contending that we should infer congressional endorsement of the 1940 Treasury Regulations. The court in that case held that "what might not be taxable income for income tax purposes might constitute wages under the provisions of the Social Security Act." *Id.*, at 465. But the Government cites nothing to suggest that this Court of Appeals' decision was brought to Congress' attention when it re-enacted the Code in 1954.

that S. S. T. 302 did not apply to the provision of meals to restaurant employees, but it also stated that S. S. T. 302 was otherwise "still in full force and effect." Rev. Rul. 57–471, 1957–2 Cum. Bull. 632. The Service did not explain why it took this position as to S. S. T. 302. It is thus clear that as late as 1957—17 years after Treas. Regs. 106 and 107 were adopted—the Service itself was inconsistent in construing the term "wages." Indeed, it was not until 1962 that the Commissioner finally disavowed S. S. T. 302 in Rev. Rul. 62–150, 1962–2 Cum. Bull. 213.[16] It therefore assumes a great deal to argue that in 1954, when FICA and FUTA were re-enacted, Congress implicitly approved these Treasury Regulations.[17] The Commissioner himself had offered no explanation by 1954

[16] Revenue Ruling 62–150 noted that S. S. T. 302 had been issued under Treasury Regulations 90, Art. 207, which incorporated the convenience-of-the-employer rule for determining "wages," and that the regulations had omitted that rule since 1940. But it did not explain why the Commissioner had changed the regulations in the first place, or why S. S. T. 302 remained in effect for years after the regulations were changed.

[17] A series of private rulings from 1954 to 1965 further reveals that S. S. T. 302 remained a source of inquiry and confusion for the Service and employers well after the re-enactment of the Internal Revenue Code in 1954. Although these rulings have no precedential force, see 26 U. S. C. § 6110 (j)(3); Treas. Reg. § 301.6110–7 (b), 26 CFR § 301.6110–7 (b) (1980), they are evidence that S. S. T. 302 did not merely lie dormant on the books after the Commissioner issued Treas. Regs. 106, § 402.227 (FICA), and 107, § 403.227 (FUTA), in 1940.

In the first of this series, a school inquired whether it had to include the value of meals served to teachers for the school's convenience in the teachers' "wages" under FICA. The Service replied in January 1954 that the school need not, for "S. S. T. 302 is applicable to the instant case." Private Ruling 5401062910A. In the second ruling, an employer inquired whether to include in "wages" under FICA the value of meals and lodging provided pursuant to an employment contract. The Service replied in March 1954 that the employer should include this value because of the employment contract. It stated that S. S. T. 302 was "based on the premises that the lunches were of relatively small value and were furnished merely as a means of promoting the health, good will, contentment, or efficiency of the employees." Private Ruling 5403042970A. In the third,

as to why the contemporaneous regulations of 1936 were changed in 1940 or why inconsistent rulings still were being issued. Indeed, the Government in this case has not yet offered an explanation.

The history of the Treasury Regulations and rulings interpreting Congress' definition of "wages" in FICA and FUTA therefore lends only the most ambiguous support to the view that Congress intended to approve different interpretations of "wages" when it re-enacted the Internal Revenue Code in 1954. The differing interpretations were not substantially contemporaneous constructions of the statutes, and nothing in the manner in which the interpretations changed is probative of congressional endorsement. Nor is there evidence of any particular consideration of these regulations by Congress during re-enactment.

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a restaurant inquired whether to include in "wages" for FICA and FUTA the value of meals provided to employees. The Service replied in January 1955 that the restaurant need not include this value, for "S. S. T. 302 is equally applicable in the instant case." Private Ruling 5501244180A. This ruling was flatly inconsistent with the Treasury Regulations that included in "wages" the value of meals provided to employees by restaurants. Treas. Regs. 106, § 402.227 (FICA); Treas. Regs. 107, § 403.227 (FUTA).

The Service had changed its view of S. S. T. 302 by the time it issued the fourth in this series. In 1957, another restaurant inquired whether the value of meals provided to employees was includable in "wages" for FICA and FUTA. Relying on S. S. T. 302, the restaurant contended that the value was excludable. The Service answered that S. S. T. 302 "cannot be regarded as controlling the treatment of meals furnished to employees in the restaurant industry." Private Ruling 5710044200A. Nonetheless, like Rev. Rul. 57–471, 1957–2 Cum. Bull. 630, this private ruling repudiated S. S. T. 302 only as to the restaurant industry, thus leaving the convenience-of-the-employer rule apparently applicable to determinations by other employers. Finally, in 1965, an employer inquired whether the revocation of S. S. T. 302 by Rev. Rul. 62–150, 1962–2 Cum. Bull. 213, applied retroactively. The Service ruled that the limitation of S. S. T. 302 in Rev. Rul. 57–471 applied retroactively only as to employers operating restaurants. Private Ruling 6507023460A.

III

We conclude that Treas. Reg. §§ 31.3121 (a)–1 (f) and 31.3306 (b)–1 (f) fail to implement the statutory definition of "wages" in a consistent or reasonable manner. The plain language and legislative histories of the relevant Acts indicate that Congress intended its definition to be interpreted in the same manner for FICA and FUTA as for income-tax withholding. The Treasury Regulations on which the Government relies fail to do so, and their inconsistent and unexplained application undermine the contention that Congress nonetheless endorsed them. As Congress did intend a consistent interpretation of its definition, these Treasury Regulations also are inconsistent with the Court's reasoning in *Central Illinois*.

We therefore hold that the Regulations are invalid, and that the Service erred in relying upon them to include in the computation of "wages" the value of the meals and lodging that petitioner provided for its own convenience to its employees on offshore oil rigs. The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

For the reasons so well stated by Judge Rubin, I agree with the judgment of the Court of Appeals for the Fifth Circuit that the Regulations under attack here are a permissible interpretation of the controlling provisions of the Internal Revenue Code. Consequently, I dissent and would affirm the judgment.

HODEL, ACTING SECRETARY OF THE INTERIOR *v.* VIRGINIA SURFACE MINING & RECLAMATION ASSOCIATION, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

No. 79–1538. Argued February 23, 1981—Decided June 15, 1981*

A pre-enforcement challenge to the constitutionality of the Surface Mining Control and Reclamation Act of 1977 (Act) was presented in a Federal District Court action wherein the plaintiffs were an association of coal producers engaged in surface coal mining operations in Virginia, some of its member coal companies, individual landowners, the Commonwealth of Virginia, and a town (hereinafter appellees). The Act is designed to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations. The Secretary of the Interior (Secretary) has primary responsibility for administering the Act by promulgating regulations and enforcing its provisions. A two-stage program for the regulation of surface mining—an interim phase and a permanent phase—is established; and environmental protection performance standards are prescribed. Ultimately, a regulatory program is to be adopted for each State, either by approval of a State's proposed permanent program that meets federal minimum standards, or by adoption of a federal program for any State that chooses not to submit a program. Enforcement of the permanent programs rests either with the participating State or with the Secretary as to nonparticipating States. The District Court, although rejecting appellees' Commerce Clause, equal protection, and substantive due process challenges to the Act, held that the Act violates the Tenth Amendment, that various provisions of the Act effect an uncompensated taking of private property in violation of the Just Compensation Clause of the Fifth Amendment, and that some of the Act's enforcement provisions violate procedural due process requirements.

Held: In the context of a facial challenge, the Act is constitutional. Pp. 275–305.

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*Together with No. 79–1596, *Virginia Surface Mining & Reclamation Association, Inc., et al.* v. *Hodel, Acting Secretary of the Interior, et al.*, also on appeal from the same court.

(a) The Act does not violate the Commerce Clause as regulating the use of private lands rather than the interstate commerce effects of surface coal mining. In view of the legislative record, which includes extended hearings concerning the effects of surface mining on the Nation's environment and economy and the need for uniform minimum nationwide standards, it cannot be said that Congress did not have a rational basis for its findings, set out in the Act itself, that surface coal mining has substantial effects on interstate commerce. And the Act's regulatory scheme is reasonably related to the goals Congress sought to accomplish—the Act's restrictions on the practices of mine operators all serving to control the environmental and other adverse effects of surface coal mining. Pp. 275–283.

(b) Sections 515 (d) and (e) of the Act, which prescribe performance standards on "steep slopes," including a requirement that an operator return the site to its "approximate original contour," and which authorize variances from the contour requirement, do not violate any Tenth Amendment limitation on congressional exercise of the commerce power as interfering with the States' "traditional governmental function" of regulating land use. The steep-slope provisions govern only the activities of coal mine operators who are private individuals and businesses, and do not regulate the "States as States." Cf. *National League of Cities* v. *Usery*, 426 U. S. 833. Appellees' contentions that the threat of federal usurpation of their regulatory roles coerces the States into enforcing the Act and that the Act regulates the States as States because it establishes mandatory minimum federal standards are without merit, since the Tenth Amendment does not limit congressional power to preempt or displace state regulation of private activities affecting interstate commerce. Moreover, Congress does not invade areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers. Pp. 283–293.

(c) The issue whether the Act's steep-slope provisions and § 522 (e), which prohibits mining in certain locations, violate the Just Compensation Clause of the Fifth Amendment is not ripe for judicial resolution. Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land. And the "mere enactment" of the Act does not constitute a taking since it does not deny an owner economically viable use of his land, the Act, except for § 522 (e), neither categorically prohibiting surface coal mining nor purporting to regulate alternative uses to which coal-bearing lands may be put. Pp. 293–297.

(d) The provisions of §§ 521, 525, and 526 of the Act pertaining to the Secretary's issuance of orders for immediate cessation of a surface mining operation determined to be in violation of the Act do not violate the Fifth Amendment's Due Process Clause. Summary administrative action resulting in deprivation of a significant property interest without a prior hearing is justified when, as here, it responds to situations in which swift action is necessary to protect the public health and safety. The objective criteria for the issuance of immediate cessation orders, established by the Act, and the Secretary's implementing regulations, are specific enough to control governmental action and reduce the risk of erroneous deprivation, and mine operators are afforded a prompt and adequate postdeprivation administrative hearing and an opportunity for judicial review. And the District Court erred in reducing to 24 hours the statutorily prescribed 5-day period for the Secretary's response to mine operators' requests for temporary relief from an immediate cessation order. The record does not show that the Secretary has not responded or will not respond in less than five days, which is the statutory maximum, and appellees have not demonstrated that they have been adversely affected by the 5-day period in a particular case or that it is generally unreasonable. In addition, no evidence was introduced to show that a shorter reply period is administratively feasible. Pp. 298–303.

(e) Appellees' due process challenge to the Act's provisions for the imposition of civil penalties for violations of cessation orders is premature. Appellees did not allege that they, or any one of them, have had civil penalties assessed against them, and there was no finding that any of appellee coal mine operators have been affected or harmed by any of the statutory procedures for the assessment and collection of fines. Pp. 303–304.

483 F. Supp. 425, affirmed in part, reversed in part, and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. BURGER, C. J., filed a concurring statement, *post*, p. 305. POWELL, J., filed a concurring opinion, *post*, p. 305. REHNQUIST, J., filed an opinion concurring in the judgment, *post*, p. 307.

Peter Buscemi argued the cause for appellant in No. 79–1538 and appellees in No. 79–1596. With him on the briefs were *Solicitor General McCree, Acting Assistant Attorney General Sagalkin,* and *Michael A. McCord.*

Marshall Coleman, Attorney General of Virginia, argued the cause for appellees in No. 79–1538 and appellants in No. 79–1596. With him on the brief for appellees Virginia Surface Mining & Reclamation Association, Inc., et al. were *Roger L. Chaffe* and *Gregory M. Luce*, Assistant Attorneys General, and *John L. Kilcullen*. *Robert T. Copeland* filed a brief for the Town of St. Charles et al., appellees under this Court's Rule 10.4, in both cases.†

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†*Norman L. Dean, Jr.*, filed a brief for the National Wildlife Federation et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Alaska et al. by *Wilson L. Condon*, Attorney General of Alaska, *Wayne Minami*, Attorney General of Hawaii, and *Johnson H. Wong*, Deputy Attorney General, *David H. Leroy*, Attorney General of Idaho, *Steven L. Beshear*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, and *Gary L. Keyser* and *Carmack M. Blackmon*, Assistant Attorneys General, *Paul J. Douglas*, Attorney General of Nebraska, and *Judy K. Hoffman*, Assistant Attorney General, *Jeff Bingaman*, Attorney General of New Mexico, *Jan Eric Cartwright*, Attorney General of Oklahoma, *Dennis J. Roberts II*, Attorney General of Rhode Island, *Mark V. Meierhenry*, Attorney General of South Dakota, and *Robert B. Hansen*, Attorney General of Utah; for the State of Arizona et al. by *Robert C. Corbin*, Attorney General of Arizona, *Wayne Minami*, Attorney General of Hawaii, and *Johnson H. Wong*, Deputy Attorney General, *Richard H. Bryan*, Attorney General of Nevada, *Larry D. Struve*, Chief Deputy Attorney General, and *Harry W. Swainston*, Deputy Attorney General, *Allen I. Olson*, Attorney General of North Dakota, and *Ray Walton*, Special Assistant Attorney General, *James M. Brown*, Attorney General of Oregon, *Robert B. Hansen*, Attorney General of Utah, *Slade Gorton*, Attorney General of Washington, and *John D. Troughton*, Attorney General of Wyoming; for the State of Illinois by *Tyrone C. Fahner*, Attorney General, and *Harvey M. Sheldon*; for the State of Texas by *Mark White*, Attorney General, *John W. Fainter, Jr.*, First Assistant Attorney General, *Richard E. Gray III*, Executive Assistant Attorney General, and *Justin Andrew Kever*, Assistant Attorney General; for Coal Operators and Associates, Inc., by *John Robert Leathers, Joseph J. Zaluski*, and *Eugene F. Mooney*; for the Mountain States Legal Foundation by *Roger J. Marzulla*; for the National Coal Association et al. by *John A.*

JUSTICE MARSHALL delivered the opinion of the Court.

These cases arise out of a pre-enforcement challenge to the constitutionality of the Surface Mining Control and Reclamation Act of 1977 (Surface Mining Act or Act), 91 Stat. 447, 30 U. S. C. § 1201 *et seq.* (1976 ed., Supp. III). The United States District Court for the Western District of Virginia declared several central provisions of the Act unconstitutional and permanently enjoined their enforcement. 483 F. Supp. 425 (1980). In these appeals, we consider whether Congress, in adopting the Act, exceeded its powers under the Commerce Clause of the Constitution,[1] or transgressed affirmative limitations on the exercise of that power contained in the Fifth and Tenth Amendments. We conclude that in the context of a facial challenge, the Surface Mining Act does not suffer from any of these alleged constitutional defects, and we uphold the Act as constitutional.

I

A

The Surface Mining Act is a comprehensive statute designed to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." § 102 (a), 30 U. S. C. § 1202 (a) (1976 ed., Supp. III). Title II of the Act, 30 U. S. C. § 1211 (1976 ed., Supp. III), creates the Office of Surface Mining Reclamation and Enforcement (OSM), within the Department of the Interior, and the Secretary of the Interior (Secretary) acting through OSM, is charged with primary responsibility for ad-

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MacLeod, and *Richard McMillan, Jr.*; and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *Raymond M. Momboisse*.

Eugene F. Mooney, George L. Seay, Jr., and *John Robert Leathers* filed a brief for Pike County, Kentucky, as *amicus curiae*.

[1] The Commerce Clause empowers Congress "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." U. S. Const., Art. I, § 8, cl. 3.

ministering and implementing the Act by promulgating regulations and enforcing its provisions. § 201 (c), 30 U. S. C. § 1211 (c) (1976 ed., Supp. III). The principal regulatory and enforcement provisions are contained in Title V of the Act, 91 Stat. 467–514, 30 U. S. C. §§ 1251–1279 (1976 ed., Supp. III). Section 501, 30 U. S. C. § 1251 (1976 ed., Supp. III), establishes a two-stage program for the regulation of surface coal mining: an initial, or interim regulatory phase, and a subsequent, permanent phase. The interim program mandates immediate promulgation and federal enforcement of some of the Act's environmental protection performance standards, complemented by continuing state regulation. Under the permanent phase, a regulatory program is to be adopted for each State, mandating compliance with the full panoply of federal performance standards, with enforcement responsibility lying with either the State or Federal Government.

Section 501 (a) directs the Secretary to promulgate regulations establishing an interim regulatory program during which mine operators will be required to comply with some of the Act's performance standards, as specified by § 502 (c), 30 U. S. C. § 1252 (c) (1976 ed., Supp. III). Included among those selected standards are requirements governing: (a) restoration of land after mining to its prior condition; (b) restoration of land to its approximate original contour; (c) segregation and preservation of topsoil; (d) minimization of disturbance to the hydrologic balance; (e) construction of coal mine waste piles used as dams and embankments; (f) revegetation of mined areas; and (g) spoil disposal. § 515 (b), 30 U. S. C. § 1265 (b) (1976 ed., Supp. III).[2] The interim

[2] Other provisions of the Act are, by their own terms, made effective during the interim period. One example is § 522 (e), 30 U. S. C. § 1272 (e) (1976 ed., Supp. III), which prohibits, with some exceptions, surface coal mining on certain lands or within specified distances of particular structures or facilities.

regulations were published on December 13, 1977, see 42 Fed. Reg. 62639,[3] and they are currently in effect in most States, including Virginia.[4]

The Secretary is responsible for enforcing the interim regulatory program. § 502 (e), 30 U. S. C. § 1252 (e) (1976 ed., Supp. III). A federal enforcement and inspection program is to be established for each State, and is to remain in effect until a permanent regulatory program is implemented in the State. States may issue permits for surface mining operations during the interim phase, but operations authorized by such permits must comply with the federal interim performance standards. § 502 (b), 30 U. S. C. § 1252 (b) (1976 ed., Supp. III). States may also pursue their own regulatory and inspection programs during the interim phase, and they may

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[3] Under §§ 502 (b), (c) of the Act, 30 U. S. C. §§ 1252 (b), (c) (1976 ed., Supp. III), the interim standards are applicable only to surface mining operations in States that were themselves regulating surface mining when the Act became law. All States in which surface mining was conducted on private lands had regulatory programs of their own when the Act was passed in 1977. Accordingly, the interim program became applicable in all relevant areas throughout the country, including Virginia.

[4] New surface mining operations, excluding those on "Federal lands" or "Indian lands," commencing on or after February 3, 1978, must comply with the performance standards established by the interim regulatory program at the start of operations. And, with certain limited exceptions, surface mining operations begun prior to February 3, 1978, were required to be in compliance with the interim regulations as of May 3, 1978. §§ 502 (b), (c), and 701 (11), 30 U. S. C. §§ 1252 (b), (c), and 1291 (11) (1976 ed., Supp. III).

Some of the interim regulations were challenged in the United States District Court for the District of Columbia pursuant to § 526 (a)(1) of the Act, 30 U. S. C. § 1276 (a)(1) (1976 ed., Supp. III). *In re Surface Mining Regulation Litigation*, 452 F. Supp. 327 (1978); *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301 (1978), aff'd in part and rev'd in part, 201 U. S. App. D. C. 360, 627 F. 2d 1346 (1980). The plaintiffs in the District of Columbia litigation also challenged the validity of a number of the statutory provisions that are at issue in the instant cases. The District Court sustained the validity of those provisions, 456 F. Supp., at 1319–1321, and the attack was not renewed on appeal.

assist the Secretary in enforcing the interim standards.[5] The States are not, however, required to enforce the interim regulatory standards and, until the permanent phase of the program, the Secretary may not cede the Federal Government's independent enforcement role to States that wish to conduct their own regulatory programs.

Section 501 (b), 30 U. S. C. § 1251 (b) (1976 ed., Supp. III), directs the Secretary to promulgate regulations establishing a permanent regulatory program incorporating all the Act's performance standards. The Secretary published the permanent regulations on March 13, 1979, see 44 Fed. Reg. 14902, but these regulations do not become effective in a particular State until either a permanent state program, submitted and approved in accordance with § 503 of the Act, or a permanent federal program for the State, adopted in accordance with § 504, is implemented.

Under § 503, any State wishing to assume permanent regulatory authority over the surface coal mining operations on "non-Federal lands" [6] within its borders must submit a proposed permanent program to the Secretary for his approval. The proposed program must demonstrate that the state legislature has enacted laws implementing the environmental protection standards established by the Act and accompanying regulations, and that the State has the administrative and technical ability to enforce these standards. 30 U. S. C. § 1253 (1976 ed., Supp. III). The Secretary must approve or disapprove each such proposed program in accordance with time schedules and procedures established by §§ 503 (b), (c),

[5] Congress encouraged such assistance by providing for financial reimbursements to States that actively assist the federal enforcement effort during the interim phase. See 30 U. S. C. § 1252 (e) (4) (1976 ed., Supp. III).

[6] A separate regulatory program governing "Federal lands" is established by § 523 of the Act, 30 U. S. C. § 1273 (1976 ed., Supp. III). The term "Federal lands" is defined in § 701 (4), 30 U. S. C. § 1291 (4) (1976 ed., Supp. III). Section 710 of the Act, 30 U. S. C. § 1300 (1976 ed., Supp. III), regulates surface mining on "Indian lands."

30 U. S. C. §§ 1253 (b), (c) (1976 ed., Supp. III).[7] In addition, the Secretary must develop and implement a federal permanent program for each State that fails to submit or enforce a satisfactory state program. § 504, 30 U. S. C. § 1254 (1976 ed., Supp. III). In such situations, the Secretary constitutes the regulatory authority administering the Act within that State and continues as such unless and until a "state program" is approved. No later than eight months after adoption of either a state-run or federally administered permanent regulatory program for a State, all surface coal mining and reclamation operations on "non-Federal lands" within that State must obtain a new permit issued in accordance with the applicable regulatory program. § 506 (a), 30 U. S. C. § 1256 (a) (1976 ed., Supp. III).

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[7] The proposed state programs were to have been submitted by February 3, 1979—18 months after the Act was passed. Exercising his authority under § 504 (a), the Secretary extended the deadline until August 3, 1979. See 44 Fed. Reg. 15324 (1979). Because the Secretary's March 1979 publication of the permanent regulations occurred seven months after the date set by the Act, see 30 U. S. C. § 1251 (b) (1976 ed., Supp. III), the United States District Court for the District of Columbia further extended the deadline for submission of state programs to and including March 3, 1980. *In re Permanent Surface Mining Regulation Litigation*, Civ. No. 79–1144 (DC July 25 and Aug. 21, 1979). See also 44 Fed. Reg. 60969 (1979) (announcing conforming changes in the Secretary's regulations governing submission of state programs).

With the exception of Alaska, Georgia, and Washington, all States in which surface mining is either conducted or is expected to be conducted submitted proposed state programs to the Secretary by March 3, 1980. The Secretary has made his initial decisions on these programs. Three programs were approved, 8 were approved on condition that the States agree to some modifications, 10 were approved in part and disapproved in part, and 3 were disapproved because the state legislatures had failed to enact the necessary implementing statutes. Virginia's program was among those approved in part and disapproved in part. See 45 Fed. Reg. 69977 (1980). Under § 503 of the Act, a State may revise a plan that has been disapproved in whole or in part and resubmit it to the Secretary within 60 days of his initial decision.

B

On October 23, 1978, the Virginia Surface Mining and Reclamation Association, Inc., an association of coal producers engaged in surface coal mining operations in Virginia, 63 of its member coal companies, and 4 individual landowners filed suit in Federal District Court seeking declaratory and injunctive relief against various provisions of the Act. The Commonwealth of Virginia and the town of Wise, Va., intervened as plaintiffs.[8] Plaintiffs' challenge was primarily directed at Title V's performance standards.[9] Because the permanent regulatory program was not scheduled to become effective until June 3, 1980, plaintiffs' challenge was directed at the sections of the Act establishing the interim regulatory program. Plaintiffs alleged that these provisions violate the Commerce Clause, the equal protection and due process guarantees of the Due Process Clause of the Fifth Amendment,[10] the Tenth Amendment,[11] and the Just Compensation Clause of the Fifth Amendment.[12]

The District Court held a 13-day trial on plaintiffs' request for a permanent injunction. The court subsequently

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[8] The Virginia Citizens for Better Reclamation, Inc., and the town of St. Charles, Va., intervened as defendants in support of the Secretary.

[9] Plaintiffs also challenged Title IV of the Act, 30 U. S. C. §§ 1231–1243 (1976 ed., Supp. III), which establishes a reclamation program for abandoned mines. The District Court, held, however, that it would exercise its discretion by "not grant[ing] declaratory judgments as to the provisions of that title." 483 F. Supp. 425, 429 (1980). There is no appeal from this portion of the District Court's judgment.

[10] The Due Process Clause of the Fifth Amendment states that no person shall "be deprived of life, liberty, or property, without due process of law."

[11] Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[12] The Compensation Clause prohibits the taking of private property "for public use, without just compensation."

issued an order and opinion declaring several central provisions of the Act unconstitutional. 483 F. Supp. 425 (1980). The court rejected plaintiffs' Commerce Clause, equal protection, and substantive due process challenges to the Act. The court held, however, that the Act "operates to 'displace the States' freedom to structure integral operations in areas of traditional functions,' . . . and, therefore, is in contravention of the Tenth Amendment." *Id.*, at 435, quoting *National League of Cities* v. *Usery*, 426 U. S. 833, 852 (1976). The court also ruled that various provisions of the Act effect an uncompensated taking of private property in violation of the Just Compensation Clause of the Fifth Amendment. Finally, the court agreed with plaintiffs' due process challenges to some of the Act's enforcement provisions. The court permanently enjoined the Secretary from enforcing various provisions of the Act.[13]

In No. 79–1538, the Secretary appeals from that portion of the District Court's judgment declaring various sections of the Act unconstitutional and permanently enjoining their enforcement. In No. 79–1596, plaintiffs cross-appeal from the District Court's rejection of their Commerce Clause challenge to the Act.[14] Because of the importance of the issues raised, we noted probable jurisdiction of both appeals,[15] 449 U. S.

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[13] The District Court denied the Secretary's motion for a stay pending direct appeal to this Court. At the same time, the court issued an order and opinion clarifying and modifying its earlier order. App. to Juris. Statement in No. 79–1538, pp. 1a–16a (J. S. App.). Upon the Secretary's application, we issued an order staying the District Court's judgment "pending the timely filing and disposition of the appeal[s] in this Court."

[14] Plaintiffs do not appeal from that portion of the District Court's judgment rejecting their equal protection and substantive due process challenges to the Act.

[15] The jurisdiction of this Court was invoked under 28 U. S. C. § 1252, which provides for direct appeal to this Court from any decision by a court of the United States invalidating an Act of Congress in any suit to which the United States, its agencies, officers, or employees are parties.

817 (1980), and consolidated the two cases.[16] For convenience, we shall usually refer to plaintiffs as "appellees."

II

On cross-appeal, appellees argue that the District Court erred in rejecting their challenge to the Act as beyond the scope of congressional power under the Commerce Clause. They insist that the Act's principal goal is regulating the use of private lands within the borders of the States and not, as the District Court found, regulating the interstate commerce effects of surface coal mining. Consequently, appellees contend that the ultimate issue presented is "whether land *as such* is subject to regulation under the Commerce Clause, *i. e.* whether land can be regarded as 'in commerce.'" Brief for Virginia Surface Mining & Reclamation Association, Inc., et al. 12 (emphasis in original). In urging us to answer "no" to this question, appellees emphasize that the Court has recognized that land-use regulation is within the inherent police powers of the States and their political subdivisions,[17] and

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[16] We also agreed to hear the appeal in No. 80-231, *Hodel* v. *Indiana*, which involves similar constitutional challenges to different provisions of the Surface Mining Act, and which we also decide today. *Post*, p. 314. At least three other District Courts have considered constitutional challenges to provisions of the Surface Mining Act. In *Concerned Citizens of Appalachia, Inc.* v. *Andrus*, 494 F. Supp. 679 (ED Tenn. 1980), appeal pending, No. 80-1488 (CA6), the District Court upheld the Act in the face of challenges similar to those raised by plaintiffs in the instant case. In *Star Coal Co.* v. *Andrus*, No. 79-171-2 (SD Iowa, Feb. 13, 1980), appeal dism'd, No. 80-1284 (CA8), the District Court rejected challenges based on the Fifth and Tenth Amendments, but enjoined some of the Act's enforcement provisions. And in *Andrus* v. *P-Burg Coal Co.*, 495 F. Supp. 82 (SD Ind. 1980), aff'd, 644 F. 2d 1231 (CA7 1981), the District Court rejected a Commerce Clause challenge to the Act.

[17] Appellees cite cases such as *Village of Belle Terre* v. *Boraas*, 416 U. S. 1 (1974); *Berman* v. *Parker*, 348 U. S. 26 (1954); *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926).

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argue that Congress may regulate land use only insofar as the Property Clause [18] grants it control over federal lands.

We do not accept either appellees' framing of the question or the answer they would have us supply. The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 258 (1964); *Katzenbach* v. *McClung*, 379 U. S. 294, 303–304 (1964). This established, the only remaining question for judicial inquiry is whether "the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution." *Heart of Atlanta Motel, Inc.* v. *United States*, *supra*, at 262. See *United States* v. *Darby*, 312 U. S. 100, 121 (1941); *Katzenbach* v. *McClung*, 379 U. S., at 304. The judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme. *Ibid.*

Judicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress. See *National League of Cities* v. *Usery*, *supra*, at 840; *Cleveland* v. *United States*, 329 U. S. 14, 19 (1946); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37 (1937). This power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons* v. *Ogden*, 9 Wheat. 1, 196 (1824). Moreover, this Court has made clear that the commerce power extends not only to "the use of channels of interstate or foreign commerce" and

[18] The Property Clause provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U. S. Const., Art. IV, § 3, cl. 2.

to "protection of the instrumentalities of interstate commerce . . . or persons or things in commerce," but also to "activities affecting commerce." *Perez* v. *United States*, 402 U. S. 146, 150 (1971). As we explained in *Fry* v. *United States*, 421 U. S. 542, 547 (1975), "[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." See *National League of Cities* v. *Usery*, 426 U. S., at 840; *Heart of Atlanta Motel, Inc.* v. *United States*, *supra*, at 255; *Wickard* v. *Filburn*, 317 U. S. 111, 127–128 (1942); *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119 (1942); *United States* v. *Darby*, *supra*, at 120–121.

Thus, when Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational. Here, the District Court properly deferred to Congress' express findings, set out in the Act itself, about the effects of surface coal mining on interstate commerce. Section 101 (c), 30 U. S. C. § 1201 (c) (1976 ed., Supp. III), recites the congressional finding that

> "many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources."

The legislative record provides ample support for these statutory findings. The Surface Mining Act became law

only after six years of the most thorough legislative consideration.[19] Committees of both Houses of Congress held extended hearings during which vast amounts of testimony and

[19] Hearings on proposed legislation regulating surface coal mining began in 1968. Surface Mining Reclamation: Hearings before the Senate Committee on Interior and Insular Affairs, 90th Cong., 2d Sess. (1968). Three years later, additional hearings were held by Committees of both the House and the Senate. Regulation of Strip Mining: Hearings before the Subcommittee on Mines and Mining of the House Committee on Interior and Insular Affairs, 92d Cong., 1st Sess. (1971); Surface Mining: Hearings before the Subcommittee on Minerals, Materials and Fuels of the Senate Committee on Interior and Insular Affairs, 92d Cong., 1st Sess. (1972). The Committees reported bills for consideration by their respective Houses. The House passed H. R. 6482, but Congress adjourned before the Senate could act on the measure.

Similar bills were reintroduced in the 93d Congress and further hearings were held. Regulation of Surface Mining Operations: Hearings before the Senate Committee on Interior and Insular Affairs, 93d Cong., 1st Sess. (1973); Regulation of Surface Mining: Hearings before the Subcommittee on the Environment and the Subcommittee on Mines and Mining of the House Committee on Interior and Insular Affairs, 93d Cong., 1st Sess. (1973). At the request of the Chairman of the Senate Committee, the Council on Environmental Quality prepared a report entitled Coal Surface Mining and Reclamation: An Environmental and Economic Assessment of Alternatives (Comm. Print 1973), and the Senate Committee held additional hearings to consider the report. Coal Surface Mining and Reclamation: Hearings before the Subcommittee on Minerals, Materials and Fuels of the Senate Committee on Interior and Insular Affairs, 93d Cong., 1st Sess. (1973). The House and Senate Committees reported bills for consideration by both Houses, and Congress passed a bill that was vetoed by President Ford in 1974.

The surface mining legislation was reintroduced in the 94th Congress in 1975, and the Senate Committee held a hearing on administration objections to the bill. Surface Mining Briefing: Briefing before the Senate Committee on Interior and Insular Affairs, 94th Cong., 1st Sess. (1975). Both Committees reported bills to the House and Senate, which again passed a bill reported by the Conference Committee. President Ford again vetoed the bill.

The protracted congressional endeavor finally bore fruit in 1977. The relevant House and Senate Committees held extensive hearings shortly after the opening of the 95th Congress to consider bills introduced at the

documentary evidence about the effects of surface mining on our Nation's environment and economy were brought to Congress' attention. Both Committees made detailed findings about these effects and the urgent need for federal legislation to address the problem. The Senate Report explained that

> "[s]urface coal mining activities have imposed large social costs on the public . . . in many areas of the country in the form of unreclaimed lands, water pollution, erosion, floods, slope failures, loss of fish and wildlife resources, and a decline in natural beauty." S. Rep. No. 95–128, p. 50 (1977).

See *id.*, at 50–54.

Similarly, the House Committee documented the adverse effects of surface coal mining on interstate commerce as including:

> " 'Acid drainage which has ruined an estimated 11,000 miles of streams; the loss of prime hardwood forest and the destruction of wildlife habitat by strip mining; the degrading of productive farmland; recurrent

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very beginning of the new legislative session. Surface Mining Control and Reclamation Act of 1977: Hearings on S. 7 before the Subcommittee on Public Lands and Resources of the Senate Committee on Energy and Natural Resources, 95th Cong., 1st Sess. (1977) (1977 Senate Hearings); Surface Mining Control and Reclamation Act of 1977: Hearings on H. R. 2 before the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs, 95th Cong., 1st Sess. (1977) (1977 House Hearings). The legislation was reported to both Houses and passage in both Chambers followed, after lengthy floor debate. 123 Cong. Rec. 12861–12886, 15691–15755 (1977). The Conference Committee Report was issued in July 1977, H. R. Conf. Rep. No. 95–493 (1977), and after further floor debate, both Houses agreed to the bill recommended by the conferees. 123 Cong. Rec. 23967–23988, 24419–24429 (1977). President Carter signed the Act into law on August 3, 1977. The legislative history of the Act is summarized in S. Rep. No. 95–128, pp. 59–61 (1977), and in H. R. Rep. No. 95–218, pp. 140–141 (1977). See also Note, 81 W. Va. L. Rev. 775 (1979).

> landslides; siltation and sedimentation of river systems . . . .'" H. R. Rep. No. 95–218, p. 58 (1977), quoting H. R. Rep. No. 94–1445, p. 19 (1976).

And in discussing how surface coal mining affects water resources and in turn interstate commerce, the House Committee explained:

> "The most widespread damages . . . are environmental in nature. Water users and developers incur significant economic and financial losses as well.
>
> "Reduced recreational values, fishkills, reductions in normal waste assimilation capacity, impaired water supplies, metals and masonry corrosion and deterioration, increased flood frequencies and flood damages, reductions in designed water storage capacities at impoundments, and higher operating costs for commercial waterway users are some of the most obvious economic effects that stem from mining-related pollution and sedimentation." H. R. Rep. No. 95–218, at 59.

See *id.*, at 96–122.

The Committees also explained that inadequacies in existing state laws and the need for uniform minimum nationwide standards made federal regulations imperative. See S. Rep. No. 95–128, at 49; H. R. Rep. No. 95–218, at 58. In light of the evidence available to Congress and the detailed consideration that the legislation received, we cannot say that Congress did not have a rational basis for concluding that surface coal mining has substantial effects on interstate commerce.

Appellees do not, in general, dispute the validity of the congressional findings.[20] Rather, appellees' contention is that

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[20] Appellees do contend that surface mining enhances rather than diminishes the utility of land in the steep-slope areas of Virginia. Congress, however, made contrary findings, and it is sufficient for purposes of judicial review that Congress had a rational basis for concluding as it did. See *Kleppe* v. *New Mexico*, 426 U. S. 529, 541, n. 10 (1976); *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–154 (1938).

the "rational basis" test should not apply in this case because the Act regulates land use, a local activity not affecting interstate commerce. But even assuming that appellees correctly characterize the land use regulated by the Act as a "local" activity, their argument is unpersuasive.

The denomination of an activity as a "local" or "intrastate" activity does not resolve the question whether Congress may regulate it under the Commerce Clause. As previously noted, the commerce power "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *United States* v. *Wrightwood Dairy Co.*, 315 U. S., at 119. See *Fry* v. *United States*, 421 U. S., at 547; *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S., at 37. This Court has long held that Congress may regulate the conditions under which goods shipped in interstate commerce are produced where the "local" activity of producing these goods itself affects interstate commerce. See, *e. g.*, *United States* v. *Darby*, 312 U. S. 100 (1941); *Wickard* v. *Filburn*, 317 U. S. 111 (1942); *NLRB* v. *Jones & Laughlin Steel Corp.*, *supra*; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517 (1942). Cf. *Katzenbach* v. *McClung*, 379 U. S. 294 (1964). Appellees do not dispute that coal is a commodity that moves in interstate commerce. Here, Congress rationally determined that regulation of surface coal mining is necessary to protect interstate commerce from adverse effects that may result from that activity. This congressional finding is sufficient to sustain the Act as a valid exercise of Congress' power under the Commerce Clause.

Moreover, the Act responds to a congressional finding that nationwide "surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States

to improve and maintain adequate standards on coal mining operations within their borders." 30 U. S. C. § 1201 (g) (1976 ed., Supp. III). The prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause. In *United States* v. *Darby, supra,* the Court used a similar rationale to sustain the imposition of federal minimum wage and maximum hour regulations on a manufacturer of goods shipped in interstate commerce. The Court explained that the statute implemented Congress' view that "interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows." *Id.,* at 115. The same rationale applies here to support the conclusion that the Surface Mining Act is within the authority granted to Congress by the Commerce Clause.

Finally, we agree with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State.[21] Appellees do not dispute that the environmental and other problems that the Act attempts to control can properly be addressed through Commerce Clause legislation. In these circumstances, it is difficult to find any remaining foundation

[21] See, *e. g., United States* v. *Byrd,* 609 F. 2d 1204, 1209–1210 (CA7 1979); *Bethlehem Steel Corp.* v. *Train,* 544 F. 2d 657, 663 (CA3 1976); *Sierra Club* v. *EPA,* 176 U. S. App. D. C. 335, 360, 540 F. 2d 1114, 1139 (1976), cert. denied, 430 U. S. 959 (1977); *District of Columbia* v. *Train,* 172 U. S. App. D. C. 311, 328, 521 F. 2d 971, 988 (1975), vacated and remanded on other grounds *sub nom. EPA* v. *Brown,* 431 U. S. 99 (1977); *United States* v. *Ashland Oil & Transportation Co.,* 504 F. 2d 1317, 1325 (CA6 1974); *Pennsylvania* v. *EPA,* 500 F. 2d 246, 259 (CA3 1974); *South Terminal Corp.* v. *EPA,* 504 F. 2d 646, 677 (CA1 1974); *United States* v. *Bishop Processing Co.,* 287 F. Supp. 624 (Md. 1968), aff'd, 423 F. 2d 469 (CA4), cert. denied, 398 U. S. 904 (1970).

for appellees' argument that, because it regulates a particular land use, the Surface Mining Act is beyond congressional Commerce Clause authority. Accordingly, we turn to the question whether the means selected by Congress were reasonable and appropriate.

Appellees' essential challenge to the means selected by the Act is that they are redundant or unnecessary. Appellees contend that a variety of federal statutes such as the Clean Air Act, 42 U. S. C. § 7401 *et seq.* (1976 ed., Supp. III), the Flood Control Acts, 33 U. S. C. § 701 *et seq.* (1976 ed., Supp. III), and the Clean Water Act, 33 U. S. C. § 1251 *et seq.* (1976 ed., Supp. III), adequately address the federal interest in controlling the environmental effects of surface coal mining without need to resort to the land-use regulation scheme of the Surface Mining Act. The short answer to this argument is that the effectiveness of existing laws in dealing with a problem identified by Congress is ordinarily a matter committed to legislative judgment. Congress considered the effectiveness of existing legislation and concluded that additional measures were necessary to deal with the interstate commerce effects of surface coal mining. See H. R. Rep. No. 95–218, at 58–60; S. Rep. No. 95–128, at 59–63. And we agree with the court below that the Act's regulatory scheme is reasonably related to the goals Congress sought to accomplish. The Act's restrictions on the practices of mine operators all serve to control the environmental and other adverse effects of surface coal mining.

In sum, we conclude that the District Court properly rejected appellees' Commerce Clause challenge to the Act. We therefore turn to the court's ruling that the Act contravenes affirmative constitutional limitations on congressional exercise of the commerce power.

III

The District Court invalidated §§ 515 (d) and (e) of the Act, which prescribe performance standards for surface coal

mining on "steep slopes," [22] on the ground that they violate a constitutional limitation on the commerce power imposed by the Tenth Amendment. These provisions require "steep-slope" operators: (i) to reclaim the mined area by completely covering the highwall and returning the site to its "approximate original contour"; [23] (ii) to refrain from dumping spoil material on the downslope below the bench or mining cut; and (iii) to refrain from disturbing land above the highwall unless permitted to do so by the regulatory authority. § 515 (d), 30 U. S. C. § 1265 (d) (1976 ed., Supp. III). Under § 515 (e), a "steep-slope" operator may obtain a variance from the approximate-original-contour requirement by showing that it will allow a postreclamation use that is "deemed to constitute an equal or better economic or public use" than would otherwise be possible. 30 U. S. C. § 1265 (e)(3)(A) (1976 ed., Supp. III).[24]

The District Court's ruling relied heavily on our decision in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976). The District Court viewed the central issue as whether the Act governs the activities of private individuals, or whether it instead regulates the governmental decisions of the States. And although the court acknowledged that the Act "ultimately affects the coal mine operator," 483 F. Supp., at 432, it concluded that the Act contravenes the Tenth Amendment

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[22] Section 515 (d)(4), 30 U. S. C. § 1265 (d)(4) (1976 ed., Supp. III), defines a "steep slope" as "any slope above twenty degrees or such lesser slope as may be defined by the regulatory authority after consideration of soil, climate, and other characteristics of a region or State."

[23] The term "approximate original contour" is defined as "that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated." § 701 (2), 30 U. S. C. § 1291 (2) (1976 ed., Supp. III).

[24] Section 515 (c), 30 U. S. C. § 1265 (c) (1976 ed., Supp. III), establishes a separate variance procedure for mountaintop mining operations.

because it interferes with the States' "traditional governmental function" of regulating land use. *Id.*, at 435. The court held that, as applied to Virginia, the Act's steep-slope provisions impermissibly constrict the State's ability to make "essential decisions." [25] The court found the Act accomplishes this result "through forced relinquishment of state control of land use planning; through loss of state control of its economy; and through economic harm, from expenditure of state funds to implement the act and from destruction of the taxing power of certain counties, cities, and towns." *Id.*, at 435.[26] The court therefore permanently enjoined enforcement of §§ 515 (d) and (e).[27]

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[25] The court reasoned that although the Act allows a State to elect to have its own regulatory program, the "choice that is purportedly given is no choice at all" because the state program must comply with federally prescribed standards. 483 F. Supp., at 432.

[26] On the basis of the evidence presented at trial, the court found that postmining restoration of steep slopes to their "approximate original contour" is "economically infeasible and physically impossible." *Id.*, at 434. The court noted that the steep-slope provisions particularly affect Virginia because 95% of its coal reserves are located on such lands. And the court indicated that several coal mine operators had been forced to shut down because they were unable to comply with the Act's requirements, with adverse consequences for the economies of various towns and counties that are dependent on coal mining. The court also found that there is a need for level land in the counties of the Virginia coal fields, and it concluded that the Act's reclamation provisions would prevent "forward-looking land use planning" by the State. *Ibid.* Finally, the court found that restoration of mined land to its original contour would diminish the value of the land from the $5,000–$300,000-an-acre value of level land to the $5–$75-per-acre value of steep-slope land.

[27] In its order and opinion accompanying its denial of the Secretary's request for a stay of its judgment pending appeal, see n. 13, *supra*, the District Court explained that the injunction against enforcement of the steep-slope standards was not intended to "allo[w] spoil to be placed on the downslope in an uncontrolled manner." The court stated that "[a]ny such downslope spoil placement shall be in a controlled manner meeting environmental protection standards specified by the regulatory authority." J. S. App. 2a.

The District Court's reliance on *National League of Cities* requires a careful review of the actual basis and import of our decision in that case. There, we considered a constitutional challenge to the 1974 amendments to the Fair Labor Standards Act which had extended federal minimum wage and maximum hour regulations to most state and local government employees. Because it was conceded that the challenged regulations were "undoubtedly within the scope of the Commerce Clause," 426 U. S., at 841, the only question presented was whether that particular exercise of the commerce power "encounter[ed] a . . . constitutional barrier because [the regulations] applied directly to the States and subdivisions of States as employers." *Ibid.* We began by drawing a sharp distinction between congressional regulation of private persons and businesses "necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside," *id.*, at 845, and federal regulation "directed, not to private citizens, but to the States as States," *ibid.* As to the former, we found no Tenth Amendment impediment to congressional action. Instead, we reaffirmed our consistent rule:

> "Congressional power over areas of private endeavor, even when its exercise may pre-empt express state-law determinations contrary to the result that has commended itself to the collective wisdom of Congress, has been held to be limited only by the requirement that 'the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution.' *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U. S. 241, 262 (1964)." *Id.*, at 840.

The Court noted, however, that "the States as States stand on a quite different footing from an individual or corporation when challenging the exercise of Congress' power to regulate commerce." *Id.*, at 854. It indicated that when Congress attempts to directly regulate the States as States the Tenth

Amendment requires recognition that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." *Id.*, at 845. The Court held that the power to set the wages and work hours of state employees was "an undoubted attribute of state sovereignty." *Ibid.* And because it further found that the challenged regulations would "displace the States' freedom to structure integral operations in areas of traditional governmental functions," *id.*, at 852, the Court concluded that Congress could not, consistently with the Tenth Amendment, "abrogate the States' otherwise plenary authority to make [these decisions]." *Id.*, at 846.[28]

It should be apparent from this discussion that in order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." *Id.*, at 854. Second, the federal regula-

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[28] *National League of Cities* expressly left open the question "whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment." 426 U. S., at 852, n. 17. In *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976), the Court upheld Congress' power under § 5 of the Fourteenth Amendment to authorize private damages actions against state governments for discrimination in employment. The Court explained that because the Amendment was adopted with the specific purpose of limiting state autonomy, constitutional principles of federalism do not restrict congressional power to invade state autonomy when Congress legislates under § 5 of the Fourteenth Amendment. *Id.*, at 452–456. Similarly, in *City of Rome* v. *United States*, 446 U. S. 156, 179 (1980), we held that the Tenth Amendment places no restrictions on congressional power "to enforce the Civil War Amendments 'by appropriate legislation.'"

tion must address matters that are indisputably "attribute[s] of state sovereignty." *Id.*, at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." *Id.*, at 852.[29] When the Surface Mining Act is examined in light of these principles, it is clear that appellees' Tenth Amendment challenge must fail because the first of the three requirements is not satisfied. The District Court's holding to the contrary rests on an unwarranted extension of the decision in *National League of Cities.*

As the District Court itself acknowledged, the steep-slope provisions of the Surface Mining Act govern only the activities of coal mine operators who are private individuals and businesses. Moreover, the States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. Cf. *Maryland* v. *EPA*, 530 F. 2d 215, 224–228 (CA4 1975), vacated and remanded *sub nom. EPA* v. *Brown*, 431 U. S. 99 (1977); *District of Columbia* v. *Train*, 172 U. S. App. D. C. 311, 330–334, 521 F. 2d 971, 990–994 (1975), vacated and remanded *sub nom. EPA* v. *Brown*, 431 U. S. 99 (1977); *Brown* v. *EPA*, 521 F.

[29] Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies state submission. See *Fry* v. *United States*, 421 U. S. 542 (1975), reaffirmed in *National League of Cities* v. *Usery*, 426 U. S., at 852–853. See also *id.*, at 856 (BLACKMUN, J., concurring).

2d 827, 837–842 (CA9 1975), vacated and remanded, 431 U. S. 99 (1977). The most that can be said is that the Surface Mining Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs. See *In re Permanent Surface Mining Regulation Litigation*, 199 U. S. App. D. C. 225, 226, 617 F. 2d 807, 808 (1980). In this respect, the Act resembles a number of other federal statutes that have survived Tenth Amendment challenges in the lower federal courts.[30]

Appellees argue, however, that the threat of federal usurpation of their regulatory roles coerces the States into enforcing the Surface Mining Act. Appellees also contend that the Act directly regulates the States as States because it establishes mandatory minimum federal standards. In essence, appellees urge us to join the District Court in looking beyond the activities actually regulated by the Act to its conceivable effects on the States' freedom to make decisions in areas of "integral governmental functions." And appellees emphasize, as did the court below, that the Act interferes with the States' ability to exercise their police powers by regulating land use.

Appellees' claims accurately characterize the Act insofar as it prescribes federal minimum standards governing surface coal mining, which a State may either implement itself or else yield to a federally administered regulatory program. To object to this scheme, however, appellees must assume that the Tenth Amendment limits congressional power to

[30] See, *e. g.*, *United States* v. *Helsley*, 615 F. 2d 784 (CA9 1979) (upholding the Airborne Hunting Act, 16 U. S. C. § 742j–1); *Friends of the Earth, Inc.* v. *Carey*, 552 F. 2d 25, 36–39 (CA2) (upholding the Clean Air Act, 42 U. S. C. § 7401 *et seq.* (1976 ed., Supp. III)), cert. denied, 434 U. S. 902 (1977); *Sierra Club* v. *EPA*, 176 U. S. App. D. C. 335, 359, 540 F. 2d 1114, 1140 (1976) (upholding the Clean Water Act, 33 U. S. C. § 1251 *et seq.*), cert. denied, 430 U. S. 959 (1977).

pre-empt or displace state regulation of private activities affecting interstate commerce. This assumption is incorrect.

A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law. See, *e. g., Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525–526 (1977); *Perez* v. *Campbell*, 402 U. S. 637, 649–650 (1971); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 141–143 (1963); *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U. S. 767, 772–776 (1947); *Hines* v. *Davidowitz*, 312 U. S. 52, 67–68 (1941). Moreover, it is clear that the Commerce Clause empowers Congress to prohibit all—and not just inconsistent—state regulation of such activities. See, *e. g., City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U. S. 624 (1973); *Campbell* v. *Hussey*, 368 U. S. 297 (1961); *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218 (1947); *Transit Comm'n* v. *United States*, 289 U. S. 121 (1933). Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result. See *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U. S. 311, 317–319 (1981); *Sanitary District* v. *United States*, 266 U. S. 405, 425–426 (1925); *The Minnesota Rate Cases*, 230 U. S. 352, 399 (1913); *Gibbons* v. *Ogden*, 9 Wheat., at 211. As the Court long ago stated: "It is elementary and well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive." *Missouri Pacific R. Co.* v. *Stroud*, 267 U. S. 404, 408 (1925).

Thus, Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining. We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role. Contrary to the assumption by both the District Court and appellees, nothing in

National League of Cities suggests that the Tenth Amendment shields the States from pre-emptive federal regulation of *private* activities affecting interstate commerce. To the contrary, *National League of Cities* explicitly reaffirmed the teaching of earlier cases that Congress may, in regulating private activities pursuant to the commerce power, "pre-empt express state-law determinations contrary to the result which has commended itself to the collective wisdom of Congress . . . ." 426 U. S., at 840. The only limitation on congressional authority in this regard is the requirement that the means selected be reasonably related to the goal of regulating interstate commerce. *Ibid.* We have already indicated that the Act satisfies this test.[31]

This conclusion applies regardless of whether the federal legislation displaces laws enacted under the States' "police powers." The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers. See *Hoke* v. *United States*, 227 U. S. 308, 320–323 (1913); *Athanasaw* v. *United States*, 227 U. S. 326 (1913); *Cleveland* v. *United States*, 329 U. S., at 19; *United States* v. *Darby*, 312 U. S., at 113–114; *United States* v. *Wrightwood Dairy Co.*, 315 U. S., at 119. Cf. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 147 (1938) ("it is no objection to the exertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states");[32] accord, *FPC* v. *Natural Gas Pipeline Co.*, 315

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[31] See *supra*, at 283. It is significant that the Commonwealth of Virginia presses its Tenth Amendment challenge to the Act simply as another regulator of surface coal mining whose regulatory program has been displaced or pre-empted by federal law. As indicated in text, there are no Tenth Amendment concerns in such situations.

[32] This holding disposes of the contention by appellees and various *amici* that the Surface Mining Act is unconstitutional because it pre-

U. S. 575, 582 (1942); *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 156 (1919); *Seven Cases* v. *United States*, 239 U. S. 510, 514 (1916). This Court has upheld as constitutional any number of federal statutes enacted under the commerce power that pre-empt particular exercises of state police power. See, *e. g.*, *United States* v. *Walsh*, 331 U. S. 432 (1947) (upholding Federal Food, Drug, and Cosmetic Act, 21 U. S. C. §§ 301–392); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937) (upholding National Labor Relations Act, 29 U. S. C. §§ 151–168); *United States* v. *Darby*, *supra* (upholding Fair Labor Standards Act, 29 U. S. C. §§ 201–219). It would therefore be a radical departure from long-established precedent for this Court to hold that the Tenth Amendment prohibits Congress from displacing state police power laws regulating private activity. Nothing in *National League of Cities* compels or even hints at such a departure.[33]

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sumes the existence of a federal police power. As the Court has stated: "'The authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce.'" *United States* v. *Darby*, 312 U. S., at 116, quoting *United States* v. *Rock Royal Co-operative*, 307 U. S. 533, 569–570 (1939).

[33] The remaining justification asserted by the District Court for its Tenth Amendment ruling, one that appellees urge here, is that the steep-slope mining requirements will harm Virginia's economy and destroy the taxing power of some towns and counties in the Commonwealth. In this regard, the court may have been influenced by the discussion in *National League of Cities* about the likely effects of the challenged regulations on the finances of state and local governments. *National League of Cities* v. *Usery*, 426 U. S., at 846–847. But as the Court made clear, the determinative factor in that case was the nature of the federal action, not the ultimate economic impact on the States. *Id.*, at 847. Moreover, even if it is true that the Act's requirements will have a measurable impact on Virginia's economy, this kind of effect, standing alone, is insufficient to establish a violation of the Tenth Amendment. In *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 534–535 (1941), the Court rejected the assertion that an adverse impact on state and local economies is a barrier to Congress'

In sum, appellees' Tenth Amendment challenge to the Surface Mining Act must fail because here, in contrast to the situation in *National League of Cities*, the statute at issue regulates only "individual businesses necessarily subject to the dual sovereignty of the government of the Nation and the State in which they reside." *National League of Cities* v. *Usery*, 426 U. S., at 845.[34] Accordingly, we turn to the District Court's ruling that the Act contravenes other constitutional limits on congressional action.

IV

The District Court held that two of the Act's provisions violate the Just Compensation Clause of the Fifth Amendment. First, the court found that the steep-slope provisions discussed above effect an uncompensated taking of private property by requiring operators to perform the "economically and physically impossible" task of restoring steep-slope surface mines to their approximate original contour. 483 F. Supp., at 437.[35] The court further held that, even if steep-slope surface mines could be restored to their approximate original contour, the value of the mined land after such restoration would have "been diminished to practically noth-

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exercise of its power under the Commerce Clause to regulate private activities affecting interstate commerce. We are not persuaded that there are compelling reasons presented in the instant cases for reversing the Court's position.

[34] We have assumed that the District Court correctly held that land-use regulation is an "integral governmental function" as that term was used in *National League of Cities*. Our resolution of the Tenth Amendment challenge to the Act makes it unnecessary for us to decide whether this is actually the case.

[35] The District Court acknowledged the existence of a statutory procedure for requesting variances from the steep-slope provisions. But the court suggested that the statutory requirement that highwalls of reclaimed mining cuts be completely covered makes this variance procedure "meaningless" to steep-slope mine operators. 483 F. Supp., at 437. This conclusion was premature. See n. 39, *infra*.

ing." *Ibid.* Second, the court found that § 522 of the Act effects an unconstitutional taking because it expressly prohibits mining in certain locations and "clearly prevent[s] a person from mining his own land or having it mined." *Id.*, at 441.[36] Relying on this Court's decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922), the District Court held that both of these provisions are unconstitutional because they "depriv[e] [coal mine operators] of any use of [their] land, not only the most profitable . . . ." 483 F. Supp., at 441.

We conclude that the District Court's ruling on the "taking" issue suffers from a fatal deficiency: neither appellees nor the court identified any property in which appellees have an interest that has allegedly been taken by operation of the Act. By proceeding in this fashion, the court below ignored this Court's oft-repeated admonition that the constitutionality of statutes ought not be decided except in an actual

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[36] With certain specified exceptions, and subject to "valid existing rights," § 522 (e) prohibits surface mining operations in national parks and forests, or where they will adversely affect publicly owned parks or places that are included in the National Register of Historic Sites. 30 U. S. C. §§ 1272 (e)(1), (2), and (3) (1976 ed., Supp. III). It also prohibits surface mining within 100 feet of a cemetery or the right-of-way of a public road, and within 300 feet of an occupied dwelling, public building, school, church, community or institutional building, or public park. §§ 522 (e)(4) and (5).

Sections 522 (a), (c), and (d), which become applicable during the permanent phase of the regulatory program, require the establishment of procedures for designating particular lands as unsuitable for some or all surface mining. 30 U. S. C. §§ 1272 (a), (c), and (d) (1976 ed., Supp. III). The District Court's ruling that these latter provisions effect an unconstitutional taking of private property is puzzling and cannot stand. Since these provisions do not come into effect until the permanent phase of the Act's regulatory program, they have not been applied to appellees or any other private landowner in Virginia. In these circumstances, there was no justiciable case or controversy with regard to these sections of the Act. See *United Public Workers* v. *Mitchell*, 330 U. S. 75, 89–91 (1947).

factual setting that makes such a decision necessary. See *Socialist Labor Party* v. *Gilligan*, 406 U. S. 583, 588 (1972); *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568–575, 584 (1947); *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461 (1945). Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property. Just last Term, we reaffirmed that

> "this Court has generally 'been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.' Rather, it has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action—that have particular significance." *Kaiser Aetna* v. *United States*, 444 U. S. 164, 175 (1979) (citations omitted).

These "ad hoc, factual inquiries" must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.

Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, this Court, is whether the "mere enactment" of the Surface Mining Act constitutes a taking. See *Agins* v. *Tiburon*, 447 U. S. 255, 260 (1980). The test to be applied in considering this facial challenge is fairly straightforward. A

statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land . . . ." *Agins* v. *Tiburon*, *supra*, at 260. See *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978). The Surface Mining Act easily survives scrutiny under this test.

First, the Act does not, on its face, prevent beneficial use of coal-bearing lands. Except for the proscription of mining near certain locations by § 522 (e), the Act does not categorically prohibit surface coal mining; it merely regulates the conditions under which such operations may be conducted.[37] The Act does not purport to regulate alternative uses to which coal-bearing lands may be put.[38] Thus, in the posture in

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[37] Although § 522 (e) prohibits any surface coal mining in certain areas, appellees' "taking" challenge to this provision is premature. First, appellees made no showing in the District Court that they own tracts of land that are affected by this provision. Second, § 522 (e) does not, on its face, deprive owners of land within its reach of economically viable use of their land since it does not proscribe nonmining uses of such land. Third, § 522 (e)'s restrictions are expressly made subject to "valid existing rights." Appellees contend that this exception "applies only to specific surface mining operations for which all required permits were issued prior to August 3, 1977, the effective date of the Act." Brief for Virginia Surface Mining Reclamation Association, Inc., et al. 48. This interpretation of the exception is not compelled by either the statutory language or its legislative history. See H. R. Rep. No. 95–218, p. 95 (1977). It is apparently based on 30 CFR § 761.5 (a) (2) (i) (1980), a regulation promulgated by the Secretary. That regulation, however, was remanded to the Secretary for reconsideration by the United States District Court for the District of Columbia. *In re Permanent Surface Mining Regulation Litigation*, 14 ERC 1083, 1091 (1980), appeals pending, No. 80–1810 et al. (CADC). The Secretary did not ask the Court of Appeals to review this portion of the District Court's judgment.

[38] If, as the District Court found, level land in the steep-slope areas of Virginia is worth $5,000–$300,000 per acre, some landowners presumably retain the option of simply leveling the land without first mining the coal. Moreover, if flat benchland is truly as valuable as the court below found, there should be no financial impediment to the re-establishment of flat

which these cases come before us, there is no reason to suppose that "mere enactment" of the Surface Mining Act has deprived appellees of economically viable use of their property.

Moreover, appellees cannot at this juncture legitimately raise complaints in this Court about the manner in which the challenged provisions of the Act have been or will be applied in specific circumstances, or about their effect on particular coal mining operations. There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance from the approximate-original-contour requirement of § 515 (d) or a waiver from the surface mining restrictions in § 522 (e). If appellees were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions.[39] The potential for such administrative solutions confirms the conclusion that the taking issue decided by the District Court simply is not ripe for judicial resolution.[40]

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areas on the sites of some old mining operations, once those areas have been restored and stabilized in the manner required by the Act.

[39] The District Court's conclusion that the steep-slope variance procedure in § 515 (e) does not offer a meaningful opportunity for administrative relief was premature. Appellees did not identify any instance in which the statutory obligation to cover the highwall had prevented a mine operator from taking advantage of the variance procedure.

[40] Although we conclude that "mere enactment" of the Act did not effect a taking of private property, this holding does not preclude appellees or other coal mine operators from attempting to show that as applied to particular parcels of land, the Act and the Secretary's regulations effect a taking. Even then, such an alleged taking is not unconstitutional unless just compensation is unavailable. See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 94, n. 39 (1978); *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 125–136 (1974); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 697, n. 18 (1949).

V

A

The District Court next ruled that the Act contravenes the Fifth Amendment because a number of its enforcement provisions offend the Amendment's Due Process Clause. One such provision is § 521 (a)(2), 30 U. S. C. § 1271 (a)(2) (1976 ed., Supp. III), which instructs the Secretary immediately to order total or partial cessation of a surface mining operation whenever he determines, on the basis of a federal inspection, that the operation is in violation of the Act or a permit condition required by the Act and that the operation

> "creates an immediate danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources . . . ." [41]

A mine operator aggrieved by an immediate cessation order issued under § 521 (a)(2) or by a cessation order issued after a notice of violation and expiration of an abatement period under § 521 (a)(3) may immediately request temporary relief from the Secretary, and the Secretary must respond to the request within five days of its receipt. § 525 (c), 30 U. S. C. § 1275 (1976 ed., Supp. III). Section 526 (c) of the Act, 30 U. S. C. § 1276 (c) (1976 ed., Supp. III), authorizes judicial review of a decision by the Secretary denying temporary relief. In addition, cessation orders are subject to informal administrative review under § 521 (a)(5), and formal administrative review, including an adjudicatory hearing, under § 525 (b), 30 U. S. C. § 1275 (b) (1976 ed., Supp.

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[41] Where the Secretary determines that a violation of the Act or of a permit condition does not entail such a serious threat, he must issue a notice of violation fixing a reasonable time for abatement. § 521 (a)(3), 30 U. S. C. § 1271 (a)(3) (1976 ed., Supp. III). If the violation is not abated within the prescribed period, the Secretary must immediately order total or partial cessation of the offending mining operation.

III).[42] The Secretary's decision in the formal review proceeding is subject to judicial review pursuant to § 526 (a)(2), 30 U. S. C. § 1276 (a)(2) (1976 ed., Supp. III).

The District Court held that § 521 (a)(2)'s authorization of immediate cessation orders violates the Fifth Amendment because the statute does not provide sufficiently objective criteria for summary administrative action. In this regard, the court relied on its finding that OSM inspectors had issued against a particular company three immediate cessation orders which were later overturned on appeal, and that the company involved had suffered significant losses. The court enjoined the Secretary from issuing any immediate cessation orders "until such time as Congress makes provisions to correct the use of subjective criteria by OSM inspectors." 483 F. Supp., at 448.[43] In addition, the court ruled that even if the Act is amended to correct this problem, the 5-day response period prescribed by the Act does not meet the requirements of due process. Instead, the court held that the Secretary must respond within 24 hours to a mine operator's request for temporary relief from an immediate cessation order. We find both aspects of the District Court's reasoning unpersuasive.

Our cases have indicated that due process ordinarily requires an opportunity for "some kind of hearing" prior to the deprivation of a significant property interest. See *Parratt* v. *Taylor*, 451 U. S. 527, 540 (1981); *Boddie* v. *Connecticut*, 401 U. S. 371, 379 (1971). The Court has often acknowl-

[42] Under § 521 (a)(5), 30 U. S. C. § 1271 (a)(5) (1976 ed., Supp. III), cessation orders automatically expire after 30 days, "unless a public hearing is held at the site or within such reasonable proximity to the site that any viewings of the site can be conducted during the course of the public hearing."

[43] The District Court's January 21, 1980, supplemental order and opinion, see n. 13, *supra*, explained that its injunction did not apply to immediate cessation orders issued pursuant to § 521 (a)(3) against mine operators who had failed to abate violations within the time period specified in the notice of violation. J. S. App. 2a–3a.

edged, however, that summary administrative action may be justified in emergency situations. See, *e. g.*, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 677–680 (1974); *Boddie* v. *Connecticut*, *supra*, at 378–379; *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594, 599–600 (1950); *Fahey* v. *Mallonee*, 332 U. S. 245, 253–254 (1947); *Yakus* v. *United States*, 321 U. S. 414, 442–443 (1944); *Bowles* v. *Willingham*, 321 U. S. 503, 519–520 (1944); *Phillips* v. *Commissioner*, 283 U. S. 589, 595–599 (1931); *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306, 315–321 (1908). The question then, is whether the issuance of immediate cessation orders under § 521 (a) falls under this emergency situation exception to the normal rule that due process requires a hearing prior to deprivation of a property right. We believe that it does.

The immediate cessation order provisions reflect Congress' concern about the devastating damage that may result from mining disasters.[44] They represent an attempt to reach an accommodation between the legitimate desire of mining companies to be heard before submitting to administrative regulation and the governmental interest in protecting the public health and safety and the environment from imminent danger. Protection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action. Indeed, deprivation of property to protect the public health and safety is "[o]ne of the oldest examples" of permissible summary action. *Ewing* v. *Mytinger & Casselberry, Inc.*, *supra*, at 599. See *Mackey* v.

[44] The legislative history of § 521 (a)(2) indicates that Congress viewed the Secretary's power to issue immediate cessation orders as critical, and that the measure was primarily intended to avert the possible occurrence of such disasters as the Buffalo Creek flood. See H. R. Rep. No. 95–218, pp. 129–130 (1977); S. Rep. No. 95–128, pp. 90–91 (1977). The Buffalo Creek flood was caused by the sudden collapse of a coal mine waste impoundment dam in 1972 near Buffalo Creek, W. Va. The flood left 124 persons dead and rendered 4,000 persons homeless. See H. R. Rep. No. 94–1445, p. 19 (1976).

Montrym, 443 U. S. 1, 17–18 (1979); *id.*, at 21, n. 1, 25 (STEWART, J., dissenting); *North American Cold Storage Co.* v. *Chicago*, *supra*, at 315–316. Moreover, the administrative action provided through immediate cessation orders responds to situations in which swift action is necessary to protect the public health and safety. This is precisely the type of emergency situation in which this Court has found summary administrative action justified. See *Ewing* v. *Mytinger & Casselberry, Inc.*, *supra*; *North American Cold Storage Co.* v. *Chicago*, *supra*.

Rather than taking issue with any of these principles, the District Court held that the Act does not establish sufficiently objective criteria governing the issuance of summary cessation orders. We disagree. In our judgment, the criteria established by the Act and the Secretary's implementing regulations are specific enough to control governmental action and reduce the risk of erroneous deprivation. Section 701 (8) of the Act, 30 U. S. C. § 1291 (8) (1976 ed., Supp. III), defines the threat of "imminent danger to the health and safety of the public" as the existence of a condition or practice which could

> "[r]easonably be expected to cause substantial physical harm to persons outside the permit area before such condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same conditions or practices giving rise to the peril, would not expose himself or herself to the danger during the time necessary for abatement." [45]

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[45] The Secretary's regulations define "a significant, imminent environmental harm" in the following terms:

"(a) An environmental harm is any adverse impact on land, air, or water resources, which resources include, but are not limited to, plant and animal life.

"(b) An environmental harm is imminent, if a condition, practice, or violation exists which—(1) Is causing such harm, or, (2) May reasonably

If anything, these standards are more specific than the criteria in other statutes authorizing summary administrative action that have been upheld against due process challenges. See, *e. g.*, *Ewing* v. *Mytinger & Casselberry, Inc.*, *supra*, at 595–596 (" 'dangerous to health . . . or would be in a material respect misleading to the injury or damage of the purchaser or consumer' "); *Fahey* v. *Mallonee*, *supra*, at 250–251, n. 1 ("is unsafe or unfit to manage a Federal savings and loan association" or "[i]s in imminent danger of becoming impaired"); *Air East, Inc.* v. *National Transportation Safety Board*, 512 F. 2d 1227, 1232 (CA3) (" 'emergency requiring immediate action . . . in respect to air safety in commerce' "), cert. denied, 423 U. S. 863 (1975).

The fact that OSM inspectors have issued immediate cessation orders that were later overturned on administrative appeal does not undermine the adequacy of the Act's criteria but instead demonstrates the efficacy of the review procedures. The relevant inquiry is not whether a cessation order should have been issued in a particular case, but whether the statutory procedure itself is incapable of affording due process. *Yakus* v. *United States*, 321 U. S., at 434–435. The possibility of administrative error inheres in any regulatory program; statutory programs authorizing emergency administrative action prior to a hearing are no exception.[46] As we

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be expected to cause such harm at any time before the end of the reasonable abatement time that would be set under Section 521 (a) (3) of the Act.

"(c) An environmental harm is significant if that harm is appreciable and not immediately reparable." 30 CFR §§ 700.5 and 701.5 (1980).

[46] A different case might be presented if a pattern of abuse and arbitrary action were discernible from review of an agency's administration of a summary procedure. Although the District Court sought to characterize the OSM's record in issuing cessation orders in these terms, a showing that three cessation orders were overturned on administrative appeal is far from sufficient to establish a pattern of abuse and arbitrary action.

explained in *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S., at 599:

> "Discretion of any official action may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination."

Here, mine operators are afforded prompt and adequate post-deprivation administrative hearings and an opportunity for judicial review. We are satisfied that the Act's immediate cessation order provisions comport with the requirements of due process.

We also conclude that the District Court erred in reducing the statutorily prescribed time period for the Secretary's response to requests for temporary relief. In the first place, the 5-day period is a statutory maximum and there is no indication in the record that the Secretary has not responded or will not respond in less than five days. Second, appellees have not demonstrated that they have been adversely affected by the 5-day response period in a particular case or that it is generally unreasonable. In addition, no evidence was introduced to show that a shorter reply period is administratively feasible. In these circumstances, there simply is no basis for the District Court's decision to substitute a judicial policy preference for the scheme adopted by Congress. Cf. *Vermont Yankee Nuclear Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519 (1978). Accordingly, we turn to the District Court's holding that other sections of the Act violate the Fifth Amendment's Due Process Clause.

B

The District Court ruled that the Act's civil penalty provisions do not comport with the requirements of due process. Under these provisions, the Secretary is to notify the recipient of a notice of violation or a cessation order of the pro-

posed amount of any civil penalty that is to be assessed against it. § 518 (c), 30 U. S. C. § 1268 (c) (1976 ed., Supp. III). Section 518 (c) further states that, if the operator "wishes to contest either the amount of the penalty or the fact of the violation," it must "forward the proposed amount to the Secretary for placement in an escrow account." [47] Once the escrow requirement is met, the operator receives a full adjudicatory hearing before an administrative law judge, with a right of appeal to an administrative board and judicial review of the final decision. See 30 U. S. C. § 1276 (a) (2) (1976 ed., Supp. III). If, after administrative or judicial review, it is determined that no violation occurred or that the amount of the proposed penalty should be reduced, the appropriate amount must promptly be refunded to the operator with interest. 30 U. S. C. § 1268 (c) (1976 ed., Supp. III).

In challenging the Act's civil penalty provisions appellees did not allege that they, or any one of them, have had civil penalties assessed against them. Moreover, the District Court did not find, as it did in ruling on the immediate cessation order provisions, that any of appellee coal mine operators have been affected or harmed by any of the statutory procedures for the assessment and collection of fines. Thus, the record in these cases belies any suggestion that there is a concrete case or controversy concerning the operation of these provisions. In these circumstances, we must conclude that appellees' challenge is premature, and that it was improper for the court below to render a decision on this claim.

VI

Our examination of appellees' constitutional challenges to the Surface Mining Act persuades us that the Act is not

[47] However, no penalties are finally imposed until the alleged offender has been provided an opportunity for a public hearing. Section 518 (b) provides: "A civil penalty shall be assessed by the Secretary only after the person charged with a violation . . . has been given an opportunity for a public hearing." 30 U. S. C. § 1268 (b) (1976 ed., Supp. III).

vulnerable to their pre-enforcement challenge. Accordingly, we affirm the judgment of the District Court upholding the Act against appellees' Commerce Clause attack (No. 79–1596), and we reverse the judgment below insofar as it held various provisions of the Act unconstitutional (No. 79–1538). The cases are remanded to the District Court with instructions to dissolve the injunction issued against the Secretary, and for further proceedings consistent with this opinion.

So ordered.

THE CHIEF JUSTICE, concurring.*

I agree largely with what JUSTICE REHNQUIST has said about the "fictions" concerning delegation, and the gradual case-by-case expansion of the reach of the Commerce Clause. I agree fully with his view that we often seem to forget the doctrine that laws enacted by Congress under the Commerce Clause must be based on a *substantial* effect on interstate commerce. However, I join the Court's opinions in these cases and in No. 80–231 because in them the Court acknowledges and reaffirms that doctrine. See, *e. g., ante,* at 280.

JUSTICE POWELL, concurring.

The Surface Mining Act mandates an extraordinarily intrusive program of federal regulation and control of land use and land reclamation, activities normally left to state and local governments. But the decisions of this Court over many years make clear that, under the Commerce Clause, Congress has the power to enact this legislation.

The Act could affect seriously the owners and lessees of the land and coal in the seven westernmost counties of Virginia. The Federal Government is required by the Fifth Amendment to pay just compensation for any "taking" of private

*[This opinion applies also to No. 80–231, *Hodel, Acting Secretary of the Interior, et al.* v. *Indiana et al., post,* p. 314.]

property for public use.[1] See *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U. S. 621, 654 (1981) (BRENNAN, J., dissenting).[2] But whether there has been such a "taking" and, if so, the amount of just compensation, are questions to be decided in specific cases. *Agins* v. *Tiburon*, 447 U. S. 255, 260 (1980); *Kaiser Aetna* v. *United States*, 444 U. S. 164, 175 (1979). I agree with the Court therefore, that it is premature to consider in these cases questions under the Compensation Clause. *Ante*, at 293–297. Appellees have identified no specific property that is alleged to have been taken. The Court's decision thus is confined to a holding that the Act in this respect is not *facially* unconstitutional. *Ante*, at 297, n. 40. The "taking" issue remains available to, and may be litigated by, any owner or lessee whose property interest is adversely affected by the enforcement of the Act.[3]

I add a word about the area of Virginia that will be affected by this Act, as its location, topography, and geology are highly relevant to an understanding of the "taking" question. Bituminous coal, Virginia's most valuable natural resource,[4] is found in a region marked by steep mountain slopes, sharp ridges, massive outcrops of rock, and narrow valleys—conditions that severely limit alternative uses of the land. Because of thin soil and rugged terrain, the land in its natural state is not suited for agricultural use or the growing of merchantable timber. Its value lies, in most instances,

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[1] We assume, of course, that Congress weighed this probable cost against the desirable environmental goals of the Act.

[2] The "taking" question considered by JUSTICE BRENNAN and the three Justices who joined him was not reached by a majority of the Court.

[3] In *Agins*, 447 U. S., at 260, we observed that the "determination that government action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."

[4] The District Court found that the mining of coal is a $2 billion per year industry in the Commonwealth.

solely in its coal. Mining the coal is a major industrial activity in an otherwise impoverished area of Virginia.[5]

A number of the Act's provisions appear to have been written with little comprehension of its potential effect on this rugged area. For example, the requirement in § 515 (d) that steep-slope areas be restored approximately to their original contours seems particularly unrealistic. As the District Court found, 95% of the strippable coal lands in Virginia are located on slopes in excess of 20 degrees. 483 F. Supp. 425, 434 (1980). The cost of restoration in some situations could exceed substantially the value of the coal. In any event restoring steep mountain slopes often would diminish rather than increase the land's worth.

In sum, if the Act is implemented broadly in accordance with its terms, the consequences to individual lessees and owners, and to the area as a whole, could be far-reaching. But adjudication of claims arising from such implementation is for the future. I agree with the Court that we cannot say that the Act is facially invalid, and I therefore join its opinion.

JUSTICE REHNQUIST, concurring in the judgment.*

It is illuminating for purposes of reflection, if not for argument, to note that one of the greatest "fictions" of our federal system is that the Congress exercises only those powers delegated to it, while the remainder are reserved to the States or to the people. The manner in which this Court has construed the Commerce Clause amply illustrates the extent of this fiction. Although it is clear that the people, through the States, *delegated* authority to Congress to "regulate Commerce . . . among the several States," U. S. Const., Art. I,

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[5] It is said, perhaps frivolously now, that bootlegging was the second most remunerative activity in that part of the State.

*[This opinion applies also to No. 80-231, *Hodel, Acting Secretary of the Interior, et al.* v. *Indiana et al.*, *post*, p. 314.]

§ 8, cl. 3, one could easily get the sense from this Court's opinions that the federal system exists only at the sufferance of Congress.

As interpreted by the Court, Congress' power under the Commerce Clause is broad indeed. The power has evolved through the years to include not simply the regulation of interstate commerce itself, as in *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), but also the power "to *exclude* from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use." *United States* v. *Darby*, 312 U. S. 100, 114 (1941). In the *Shreveport Rate Case*, 234 U. S. 342, 351 (1914), the Court upheld the action of Congress in regulating the rates of *intrastate* railroads, reasoning that the commerce power included the power to "control . . . all matters having such a close and substantial relation to interstate traffic . . . ." In *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), the Court rejected the notion that certain kinds of activity were not in "commerce," such as manufacturing, cf. *United States* v. *E. C. Knight Co.*, 156 U. S. 1 (1895), and concluded that Congress may regulate labor relations in any manufacturing plant because a work stoppage at any such plant "would have a most serious effect upon interstate commerce." 301 U. S., at 41. And in *Wickard* v. *Filburn*, 317 U. S. 111 (1942), the Court expanded the scope of the Commerce Clause to include the regulation of acts which taken alone might not have a substantial economic effect on interstate commerce, such as a wheat farmer's own production, but which might reasonably be deemed nationally significant in their cumulative effect, such as altering the supply-and-demand relationships in the interstate commodity market. See also *Perez* v. *United States*, 402 U. S. 146, 154 (1971) ("Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class"). As

summarized by one commentator: "In recent years, Congress has relied upon the 'cumulative effect' principle as its constitutional justification for civil rights legislation, certain criminal statutes, regulatory measures affecting the sale of foods and additives, and a registration law for drug producers. In each case, congressional fact-findings stressed that the regulation of local incidents of an activity was necessary to abate a cumulative evil affecting national commerce." L. Tribe, American Constitutional Law 237 (1978).

Despite the holdings of these cases, and the broad dicta often contained therein, there *are* constitutional limits on the power of Congress to regulate pursuant to the Commerce Clause. As Chief Justice Hughes explained:

> "Undoubtedly the scope of this power must be considered in light of our dual system of government and may not be extended so as to embrace effects on interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB* v. *Jones & Laughlin Steel Corp., supra,* at 37.

And Justice Cardozo, in his cogent writing on the subject, often expressed his concern about too broad a reading of the commerce power. In his concurring opinion in *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 554–555 (1935), he observed:

> "There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors throughout its territory; the only question is of size.' . . . The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate

> and national because of distant repercussions. . . . To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system."

Justice Cardozo elaborated on this point in his separate opinion in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 327 (1936).

> "Mining and agriculture and manufacture are not interstate commerce considered by themselves, yet their relationship to that commerce may be such that for the protection of the one there is need to regulate the other. *Schechter Poultry Corp.* v. *United States* . . . . Sometimes it is said that the relation must be 'direct' to bring that power into play. In many circumstances such a description will be sufficiently precise to meet the needs of the occasion. But a great principle of constitutional law is not susceptible of comprehensive statement in an adjective. The underlying thought is merely this, that 'the law is not indifferent to considerations of degree.' *Schechter Poultry Corp.* v. *United States, supra,* concurring opinion, p. 554. It cannot be indifferent to them without an expansion of the commerce clause that would absorb or imperil the reserved powers of the states. At times, as in the case cited, the waves of causation will have radiated so far that their undulatory motion, if discernible at all, will be too faint or obscure, too broken by cross-currents, to be heeded by the law."

Thus it would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited. Some activities may be so private or local in nature that they simply may not be *in* commerce. Nor is it sufficient that the person or activity reached have *some* nexus with interstate commerce. Our cases have consistently held that the regulated activity must have a *substantial* effect on

interstate commerce. *E. g., NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S., at 37 (local activities may be regulated if they have a "close and substantial relation to interstate commerce"). Moreover, simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so. Congress' findings must be supported by a "rational basis" and are reviewable by the courts. Cf. *Perez* v. *United States*, 402 U. S., at 157 (STEWART, J., dissenting).* In short, unlike the reserved police powers of the States, which are plenary unless challenged as violating some specific provision of the Constitution, the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce Clause.

In many ways, the Court's opinions in these cases are consistent with that approach. In both the Virginia and Indiana cases, the Court exhaustively analyzes Congress' articulated justifications for the exercise of its power under the Commerce Clause and concludes that Congress' detailed factual findings as to the effect of surface mining on interstate commerce are sufficient to justify the exercise of that power. Though there can be no doubt that Congress in regulating surface mining has stretched its authority to the "nth degree," our prior precedents compel me to agree with the Court's conclusion. I therefore concur in the judgments of the Court.

There is, however, a troublesome difference between what the Court does and what it says. In both cases, the Court asserts that regulation will be upheld if Congress had a rational basis for finding that the regulated activity affects

*Of course, once the power of Congress to regulate is established, the Court will rarely question the manner in which that power is exercised. *E. g., U. S. Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166 (1980). Within its sphere of authority, the power of Congress is broad and should only rarely be subject to judicial invalidation. The question here, in contrast, is whether Congress even has the authority to act.

interstate commerce. *Virginia Surface Mining, ante,* at 276; *Indiana, post,* at 323–325. The Court takes this statement of the proper "test" from *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U. S. 241, 258 (1964). In my view, the Court misstates the test. As noted above, it has long been established that the commerce power does not reach activity which merely "affects" interstate commerce. There must instead be a showing that regulated activity has a *substantial effect* on that commerce. See *NLRB* v. *Jones & Laughlin Steel Corp., supra; Shreveport Rate Cases,* 234 U. S. 342 (1914); *Wickard* v. *Filburn,* 317 U. S., at 125 (local activity may be reached by Congress if "it exerts a substantial economic effect on interstate commerce"); *North American Co.* v. *SEC,* 327 U. S. 686, 705 (1946) (Congress may attack an evil which bears a "substantial relationship to interstate commerce"). As recently as *Maryland* v. *Wirtz,* 392 U. S. 183, 197, n. 27 (1968), Justice Harlan stressed that "[n]either here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." Even in *Heart of Atlanta Motel, Inc.,* in the paragraph just prior to the passage relied on by the Court here, the Court emphasized that Congress had the power to regulate local activities "which might have a substantial and harmful effect upon that commerce." 379 U. S., at 258. Though I believe the Court errs in its statement of the "test," it may be that I read too much into the Court's choice of language. In the Virginia case, for example, it does mention at one point that Congress did have a "rational basis for concluding that surface coal mining has substantial effects on interstate commerce." *Ante,* at 280.

In sum, my difficulty with some of the recent Commerce Clause jurisprudence is that the Court often seems to forget that legislation enacted by Congress is subject to two different kinds of challenge, while that enacted by the States is subject to only one kind of challenge. Neither Congress nor

the States may act in a manner prohibited by any provision of the Constitution. Congress must show that the activity it seeks to regulate has a substantial effect on interstate commerce. It is my uncertainty as to whether the Court intends to broaden, by some of its language, this test that leads me to concur only in the judgments.

HODEL, ACTING SECRETARY OF THE INTERIOR, ET AL. *v.* INDIANA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

No. 80-231. Argued February 23, 1981—Decided June 15, 1981

This appeal involves a constitutional challenge to the so-called "prime farmland" provisions and certain general provisions of the Surface Mining Control and Reclamation Act of 1977 (Act). The prime farmland provisions establish special requirements for surface coal mining operations conducted on land that both qualifies as prime farmland and has historically been used as cropland. These provisions include § 510 (d) (1), which requires an applicant for a permit for mining on prime farmland to show that he has the capacity to restore the land, within a reasonable time after the completion of mining, to the productivity level of prime farmland in the surrounding area; § 519 (c)(2), which conditions release of a mine operator's bond on the completion of such restoration; and § 508 (a)(2), which directs mine operators to include information about the premining productivity of the land in the reclamation plans filed as part of permit applications. The general provisions in question include § 515 (b)(3), which requires restoration of mined land to its approximate original contour; § 515 (b)(5), which requires surface mine operators to remove topsoil separately and preserve it for use during reclamation; § 508, which requires applicants for surface mining permits to submit reclamation plans; §§ 522 (a), (c), and (d), which require States wishing to regulate surface mining to establish an administrative procedure for determining whether particular lands are unsuitable for surface mining; § 522 (e), which proscribes mining within a specified distance of roads, cemeteries, public buildings, schools, churches, public parks, or dwellings; and the Act's procedures for collecting civil penalties from violators of the Act, including a requirement that a contested penalty be paid into an escrow account pending review. Appellees (the State of Indiana and several of its officials, the Indiana Coal Association, several coal mine operators, and others) filed suits in Federal District Court, alleging that the provisions in question contravene the Commerce Clause, the equal protection and due process guarantees of the Due Process Clause of the Fifth Amendment, the Tenth Amendment, and the Just Compensation Clause of the Fifth Amendment. The District Court sustained each of the constitutional

challenges and permanently enjoined enforcement of the challenged provisions.

Held: The Act is not vulnerable to appellees' pre-enforcement constitutional challenge. Pp. 321–336.

(a) The provisions in question do not violate the Commerce Clause. The Act was adopted to ensure that production of coal for interstate commerce would not be at the expense of agriculture, the environment, or public health and safety, and to protect mine operators in States adhering to high performance and reclamation standards from disadvantageous competition with operators in States with less rigorous regulatory programs. The challenged provisions advance these legitimate goals, and Congress acted reasonably in adopting the regulatory scheme contained in the Act. Pp. 321–329.

(b) Nor do the challenged provisions contravene the Tenth Amendment. Such provisions regulate only the activities of surface mine operators who are private individuals and businesses, and do not directly regulate the States as States. P. 330.

(c) The prime farmland and approximate-original-contour provisions do not violate the equal protection and due process guarantees of the Fifth Amendment. Congress acted rationally in making no allowances for variances from the prime farmland requirements and in allowing variances from the approximate original contour only for steep-slope and mountaintop operations. The fact that a particular State has more mining operations under prime farmland and fewer steep-slope or mountaintop operations than another State does not establish impermissible discrimination under the Fifth Amendment's Due Process Clause. And, by invalidating the prime farmland and approximate-original-contour provisions under the rubric of "substantive due process," the District Court essentially acted as a superlegislature and accordingly exceeded its proper role. Pp. 331–333.

(d) Sections 510 (d)(1), 519 (c)(2), 508 (a)(2), and 522 (a), (c), (d), and (e) do not take private property without just compensation in violation of the Fifth Amendment. Appellees' taking claims do not focus on any particular properties to which the challenged provisions have been applied. Similarly, the District Court's ruling did not pertain to the taking of a particular piece of property or the denial of a mining permit for specific farmland operations proposed by appellees. The "mere enactment" of the Act did not effect an unconstitutional taking of private property. The prime farmland provisions do not prohibit surface mining but merely regulate the conditions under which such mining may be conducted. Pp. 333–335.

(e) Appellees' challenge to the civil penalty provisions of the Act as

depriving mine operators of their right to due process is premature, where appellees have not shown that they were ever assessed civil penalties, much less that the statutory prepayment requirement was ever applied to them or caused them any injury. Pp. 335–336.

501 F. Supp. 452, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. BURGER, C. J., filed a concurring statement, *ante*, p. 305. REHNQUIST, J., filed an opinion concurring in the judgment, *ante*, p. 307.

Peter Buscemi argued the cause for appellants. With him on the brief were *Solicitor General McCree*, *Acting Assistant Attorney General Sagalkin*, and *Michael A. McCord*.

G. Daniel Kelley, Jr., argued the cause for appellees. With him on the brief were *Theodore L. Sendak*, Attorney General of Indiana, *Linley E. Pearson*, Attorney General-Elect, *Jack R. O'Neill*, Deputy Attorney General, *Harry T. Ice*, and *Byron L. Myers*.*

**Norman L. Dean, Jr.*, filed a brief for the National Wildlife Federation et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Alaska et al. by *Wilson L. Condon*, Attorney General of Alaska, *Wayne Minami*, Attorney General of Hawaii, and *Johnson H. Wong*, Deputy Attorney General, *David H. Leroy*, Attorney General of Idaho, *Steven L. Beshear*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, and *Gary L. Keyser* and *Carmack M. Blackmon*, Assistant Attorneys General, *Paul L. Douglas*, Attorney General of Nebraska, and *Judy K. Hoffman*, Assistant Attorney General, *Jeff Bingaman*, Attorney General of New Mexico, *Jan Eric Cartwright*, Attorney General of Oklahoma, *Dennis J. Roberts II*, Attorney General of Rhode Island, *Mark V. Meierhenry*, Attorney General of South Dakota, and *Robert B. Hansen*, Attorney General of Utah; for the State of Arizona et al. by *Robert C. Corbin*, Attorney General of Arizona, *Wayne Minami*, Attorney General of Hawaii, and *Johnson H. Wong*, Deputy Attorney General, *Richard H. Bryan*, Attorney General of Nevada, *Larry D. Struve*, Chief Deputy Attorney General, and *Harry W. Swainston*, Deputy Attorney General, *Allen I. Olson*, Attorney General of North Dakota, and *Ray Walton*, Special Assistant Attorney General, *James M. Brown*, Attorney General of Oregon, *Robert B. Hansen*, Attorney General of Utah, *Slade*

JUSTICE MARSHALL delivered the opinion of the Court.

This appeal, like *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc., ante*, p. 264, also decided today, involves a broad constitutional challenge to numerous important provisions of the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 445, 30 U. S. C. § 1201 *et seq.* (1976 ed., Supp. III) (Surface Mining Act or Act). Many of the specific provisions attacked in this case, however, differ from the "steep-slope" provisions that were the primary focus of the challenge in *Virginia Surface Mining*. The United States District Court for the Southern District of Indiana ruled that the provisions of the Act challenged here are unconstitutional and permanently enjoined their enforcement. 501 F. Supp. 452 (1980). We noted probable jurisdiction *sub nom. Andrus* v. *Indiana*, 449 U. S. 816 (1980), and we now reverse.

I

A

The basic structure of the Surface Mining Act is described in *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*,

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Gorton, Attorney General of Washington, and *John D. Troughton*, Attorney General of Wyoming; for the State of Illinois by *Tyrone C. Fahner*, Attorney General, and *Harvey M. Sheldon;* for the State of Iowa by *Thomas J. Miller*, Attorney General, and *Elizabeth M. Osenbaugh*, Assistant Attorney General; for the State of Maryland by *Stephen H. Sachs*, Attorney General, and *Thomas A. Deming* and *Michael J. Sibinicio II*, Assistant Attorneys General; for the State of Texas by *Mark White*, Attorney General, *John W. Fainter, Jr.*, First Assistant Attorney General, *Richard E. Gray III*, Executive Assistant Attorney General, and *Justin Andrew Kever*, Assistant Attorney General; for the Mid-America Legal Foundation by *John M. Cannon;* for the Mountain States Legal Foundation by *Roger J. Marzulla;* for the National Coal Association et al. by *John A. MacLeod*, and *Richard McMillan, Jr.;* and for the National League of Cities et al. by *Ross D. Davis, Robert K. Corbin*, Attorney General of Arizona, *Robert T. Stephen*, Attorney General of Kansas, and *Bruce Eugene Miller*, Deputy Attorney General, and *David L. Wilkinson*, Attorney General of Utah.

ante, at 268–272, and it will therefore suffice here to briefly describe the specific provisions drawn into question in this case. Several of the challenged sections of the Act are known collectively as the "prime farmland" provisions. These sections establish special requirements for surface mining operations conducted on land that both qualifies as prime farmland under a definition promulgated by the Secretary of Agriculture and has historically been used as cropland within the meaning of the regulations of the Secretary of the Interior (Secretary) implementing the Surface Mining Act. § 701 (20), 30 U. S. C. § 1291 (20) (1976 ed., Supp. III).[1] A permit for surface coal mining on such lands may be granted only if the mine operator can demonstrate its "technological capability to restore such mined area, within a reasonable time, to equivalent or higher levels of yield as nonmined prime farmland in the surrounding area under equivalent levels of management . . . ." § 510 (d)(1), 30 U. S. C. § 1260 (d)(1) (1976 ed., Supp. III). The operator must also show

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[1] Section 701 (20), 91 Stat. 517, 30 U. S. C. § 1291 (20) (1976 ed., Supp. III), provides that

"the term 'prime farmland' shall have the same meaning as that previously prescribed by the Secretary of Agriculture on the basis of such factors as moisture availability, temperature regime, chemical balance, permeability, surface layer composition, susceptibility to flooding, and erosion characteristics, and which historically have been used for intensive agricultural purposes, and as published in the Federal Register."

The Secretary of Agriculture's definition is found at 7 CFR pt. 657 (1980), and is incorporated into the Secretary of the Interior's regulations implementing the Act by 30 CFR § 701.5 (1980). The Secretary published regulations defining "prime farmland" for purposes of the Act's interim phase. The United States District Court for the District of Columbia remanded the regulations to the Secretary for reconsideration on grounds not pertinent here. See *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1312 (1978), rev'd in part on other grounds, 201 U. S. App. D. C. 360, 627 F. 2d 1346 (1980). The Secretary has published proposed new regulations defining "prime farmland" for purposes of the interim program. See 44 Fed. Reg. 33625 (1979).

that it can "meet the soil reconstruction standards" for prime farmland set forth in § 515 (b)(7), 30 U. S. C. § 1265 (b)(7) (1976 ed., Supp. III). That section specifies that the distinct soil layers on prime farmland must be separately removed, segregated, stockpiled, and then properly replaced and regraded. Furthermore, § 519 (c)(2), 30 U. S. C. § 1269 (c)(2) (1976 ed., Supp. III), provides that upon its completion of mining activities on prime farmland, a mine operator can have its performance bond released only on a showing that soil productivity "has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices . . . ."[2]

Also challenged here are some of the Act's more general provisions that are applicable throughout the country. These include § 515 (b)(3), which requires restoration of mined land to its approximate original contour,[3] and the directive in § 515 (b)(5), 30 U. S. C. § 1265 (b)(5) (1976 ed., Supp. III), that surface mine operators remove topsoil separately during mining activities and preserve it for use during reclamation if it is not to be replaced immediately on the backfill area of the mining cut. Section 508, 30 U. S. C. § 1258 (1976 ed., Supp. III), requires applicants for surface coal mining permits to submit proposed reclamation plans specifying the intended postmining use of the land and the method by which that use will be achieved. In addition, §§ 522 (a), (c), (d), 30 U. S. C. §§ 1272 (a), (c), (d) (1976 ed., Supp. III), require States wishing to assume permanent

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[2] Under § 509 of the Act, 30 U. S. C. § 1259 (1976 ed., Supp. III), no mining permits may be issued until the operator has filed a performance bond with the appropriate regulatory authority.

[3] Section 515 (b)(3) describes the "approximate original contour" requirement applicable generally to surface mining operations. Appellees in *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc., ante,* p. 264, challenged the approximate-original-contour provision in § 515 (d) of the Act, which is applicable only to surface mining operations on steep slopes.

regulatory authority over surface coal mining to establish an administrative procedure for determining whether particular lands are unsuitable for some or all kinds of surface mining.[4] Section 522 (e), 30 U. S. C. § 1272 (e) (1976 ed., Supp. III), proscribes mining activity within 100 feet of roadways and cemeteries or within 300 feet of public buildings, schools, churches, public parks, or occupied dwellings. Finally, the Act's procedures for collecting proposed civil penalties contained in § 518 (c), 30 U. S. C. § 1268 (c) (1976 ed., Supp. III), are also drawn into question here.

B

These suits were filed in August 1978, one by the State of Indiana and several of its officials, and the other by the Indiana Coal Association, several coal mine operators, and others. The complaints alleged that the Act contravenes the Commerce Clause, the equal protection and due process guarantees of the Due Process Clause of the Fifth Amendment, the Tenth Amendment, and the Just Compensation Clause of the Fifth Amendment.

The District Court held a 1-day hearing on plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss, and the court ultimately decided the case on the merits without taking further evidence. On June 10, 1980, the District Court issued an order and opinion sustaining each of plaintiffs' constitutional challenges and permanently enjoining the Secretary from enforcing the challenged sections of the Act. 501 F. Supp. 452 (SD Ind. 1980).[5]

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[4] The progress of the States in submitting proposed permanent regulatory programs under § 503 of the Act and the Secretary's response to those submissions is described in *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc., ante,* at 272, n. 7. The proposed program submitted by Indiana was approved in part and disapproved in part. See 45 Fed. Reg. 78482 (1980).

[5] On July 2, 1980, JUSTICE STEVENS stayed the District Court's judgment pending final disposition of this appeal.

II

The District Court gave two rationales for its decision on the Commerce Clause issue. The court first held that the six "prime farmland" provisions[6] are beyond congressional power to regulate interstate commerce because they are "directed at facets of surface coal mining which have no substantial and adverse effect on interstate commerce." *Id.*, at 460. The court reached this conclusion by examining statistics in the Report of the Interagency Task Force on the Issue of a Moratorium or a Ban on Mining in Prime Agricultural Lands (1977) (Interagency Report).[7] These statistics com-

[6] The six are:

(1) § 507 (b)(16), 30 U. S. C. § 1257(b)(16) (1976 ed., Supp. III), which requires a "soil survey" of suspected prime farmlands "to confirm the exact location of such prime farmlands, if any";

(2) § 508 (a)(2)(C), 30 U. S. C. § 1258 (a)(2)(C) (1976 ed., Supp. III), which directs a mine operator to include in its reclamation plan information about "the productivity of land prior to mining, including appropriate classification as prime farm lands, as well as the average yield of food, fiber, forage, or wood products from such lands obtained under high levels of management";

(3) § 510 (d)(1), 30 U. S. C. § 1260 (d)(1) (1976 ed., Supp. III), which allows permits to be issued for mining on prime farmland only when the regulatory authority is satisfied that the operator "has the technological capability to restore such mined area, within a reasonable time, to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management and can meet the soil reconstruction standards in Section 515 (b)(7). . . .";

(4) § 515 (b)(7), 30 U. S. C. § 1265 (b)(7) (1976 ed., Supp. III), which requires the separate removal and replacement of the A, B, and C soil horizons of prime farmland;

(5) § 515 (b)(20), insofar as it authorizes regulatory authorities to approve "long-term, intensive, agricultural postmining land use"; and

(6) § 519 (c)(2), 30 U. S. C. § 1269 (c)(2) (1976 ed., Supp. III), which provides that performance bonds for mining on prime farmland may not be released "until soil productivity for prime farm lands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices . . . ."

[7] The Interagency Report was submitted to the House Committee on

pared the prime farmland acreage being disturbed annually by surface mining to the total prime farmland acreage in the United States. The Interagency Report stated that approximately 21,800 acres of prime farmland were being disturbed annually and that this acreage amounted to 0.006% of the total prime farmland acreage in the Nation. 501 F. Supp., at 459. This statistic and others derived from it, together with similar comparisons for Indiana, persuaded the court that surface coal mining on prime farmland has "an infinitesimal effect or trivial impact on interstate commerce." *Id.*, at 458.[8]

With respect to the other 15 substantive provisions which apply to surface mining generally,[9] the District Court rea-

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Interior and Insular Affairs in April 1977, one month after the Committee completed hearings on the proposed surface mining legislation. See 501 F. Supp. 452, 459 (SD Ind. 1980).

[8] The court noted that it would take 166 years for surface mining to disturb 1% of the total prime farmland in the country. The court also noted that in 1977 the Government's Agricultural Stabilization and Conservation Service paid farmers not to grow crops on 5,900,000 acres, which is 200 times the prime farmland acreage disturbed annually by surface mining. With respect to Indiana, the court pointed out that only 40,000 acres of prime farmland are projected to be disturbed by surface mining in Indiana in the next 20 years, and that this figure amounts to 0.003% of the total prime farmland in Indiana. *Id.*, at 459–460. In addition, the court noted that in 1977, the Government paid Indiana farmers not to farm 369,153 acres, nearly 1,000% more land than would be affected by surface mining in Indiana in the next 20 years. *Id.*, at 460.

[9] These provisions are:

(1) § 515 (b)(3), 30 U. S. C. § 1265 (b)(3) (1976 ed., Supp. III), requiring restoration of surface mined land to its approximate original contour;

(2) § 515 (b)(5), 30 U. S. C. § 1265 (b)(5) (1976 ed., Supp. III), requiring separate removal, segregation, and ultimate replacement of topsoil on mined land;

(3) §§ 522 (a), (c), (d), (e)(4), (e)(5), 30 U. S. C. §§ 1272 (a), (c), (d), (e)(4), (e)(5) (1976 ed., Supp. III), requiring permanent regulatory programs to establish procedures for designating particular lands as unsuit-

soned that the only possible adverse effects on interstate commerce justifying congressional action are air and water pollution and determined that these effects are adequately addressed by other provisions of the Act. The court therefore concluded that these 15 provisions as well as the 6 prime farmland provisions "are not directed at the alleviation of water or air pollution, to the extent that there are [any] such effects, and are not means reasonably and plainly adapted to [the legitimate end of] removing any substantial and adverse effect on interstate commerce." *Id.*, at 461. We find both of the District Court's rationales untenable.

It is established beyond peradventure that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality . . . ." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 15 (1976). See also *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 83–84 (1978). A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate com-

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able for surface mining, and restricting surface mining within a specified radius of certain facilities;

(4) §§ 508 (a)(2), (3), (4), (8), (10), 30 U. S. C. §§ 1258 (a)(2), (3), (4), (8), (10) (1976 ed., Supp. III), requiring that reclamation plans be submitted as part of permit applications under the permanent regulatory program, including descriptions of the premining use of the affected land, the proposed postmining use, and the methods by which the proposed use will be achieved;

(5) §§ 510 (b)(1), (2), 30 U. S. C. §§ 1260 (b)(1), (2) (1976 ed., Supp. III), the general provisions governing approval or disapproval of permit applications under the permanent regulatory program (invalidated to the extent that they entail regulatory authority review of proposed postmining land uses); and

(6) §§ 515 (b)(19), (20), 30 U. S. C. §§ 1265 (b)(19), (20) (1976 ed., Supp. III), requiring maintenance of revegetation of mined lands for a 5- or 10-year period after completion of mining (invalidated to the extent that they may incorporate a requirement of compliance with a postmining land-use plan approved by the regulatory authority).

merce, or that there is no reasonable connection between the regulatory means selected and the asserted ends. *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc., ante,* at 276; *Katzenbach* v. *McClung,* 379 U. S. 294, 303–304 (1964); *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U. S. 241, 258, 262 (1964). We are not convinced that the District Court had reliable grounds to reach either conclusion in this case.

In our view, Congress was entitled to find that the protection of prime farmland is a federal interest that may be addressed through Commerce Clause legislation. The Interagency Report provides no basis for the District Court's contrary view. That report dealt only with the question whether a complete moratorium or ban on surface coal mining on prime farmland was advisable as a matter of policy. The report neither purported to examine the full impact of surface mining on interstate commerce in agricultural commodities, nor concluded that the impact is too negligible to warrant federal regulation.[10] More important, the court below incorrectly assumed that the relevant inquiry under the rational-basis test is the volume of commerce actually affected by the regulated activity. This Court held in *NLRB* v. *Fainblatt,* 306 U. S. 601, 606 (1939), that "[t]he power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small." The pertinent inquiry therefore is not how much commerce is involved but whether Congress could rationally conclude that the regulated activity affects interstate commerce. See

[10] As explained in the Report of the House Committee, Congress followed the recommendation of the Interagency Report, and rejected a Carter administration proposal for a 5-year moratorium on surface mining on prime farmlands. The Committee explained that Soil Conservation Service officials testified that mined prime farmland could be restored to its original productivity levels through compliance with the prime farmland provisions now contained in the Act. H. R. Rep. No. 95–218, pp. 184–185 (1977).

Hodel v. *Virginia Surface Mining & Reclamation Assn., Inc.*, *ante*, at 276–277; *Perez* v. *United States*, 402 U. S. 146, 154–156 (1971); *Katzenbach* v. *McClung*, *supra*, at 303–304; *Wickard* v. *Filburn*, 317 U. S. 111, 127–129 (1942). Cf. *Polish National Alliance* v. *NLRB*, 322 U. S. 643, 648 (1944); *United States* v. *Darby*, 312 U. S. 100, 123 (1941).[11]

Against this background, we have little difficulty in concluding that the congressional finding in this case satisfies the rational-basis test. The Senate considered information from the Interagency Report about the prime farmland acreage that might be affected by surface coal mining. See 123 Cong. Rec. 15713 (1977) (remarks of Sen. Percy). In addition, Senator Percy called the Senate's attention to testimony presented at the Senate Committee hearings about the losses in agricultural productivity attributable to surface mining.[12] *Id.*, at 15713–15717. See also *id.*, at 15720–15721 (remarks of Sen. Humphrey), 15721 (remarks of Sen. Stevenson). Similar evidence was presented during the contemporaneous hearings before the House Committee,[13] and the Committee

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[11] In any event, the District Court's "finding" that only an insignificant amount of interstate commerce is affected by surface mining on prime farmland is questionable. The court noted that the 21,800 acres of prime farmland disturbed annually by surface mining would have produced about 0.04% of the Nation's total corn production in the 1976–1977 crop year. See 501 F. Supp., at 459. Although this percentage may seem small, it is worth remembering that corn production for grain in that year was 6.4 billion bushels, worth some $12.9 billion. See United States Department of Agriculture, Agricultural Statistics 30 (1979). Therefore, the 0.04% of corn production would have had an approximate value of $5.16 million which surely is not an insignificant amount of commerce.

[12] See Surface Mining Control and Reclamation Act of 1977: Hearings on S. 7 before the Subcommittee on Public Lands and Resources of the Senate Committee on Energy and Natural Resources, 95th Cong., 1st Sess., 775–811 (1977) (Senate Hearings).

[13] See Surface Mining Control and Reclamation Act of 1977: Hearings on H. R. 2 before the Subcommittee on Energy and the Environment

Report referred to this testimony in explaining the origins of the "prime farmland" provisions. The Report stated:

> "The Committee heard testimony from citizens and local officials of Illinois and Indiana requesting that special attention be given in the bill to the protection of prime agricultural lands. Working with officials of the Soil Conservation Service, the Committee added a number of provisions to H. R. 2 designed to insure the proper reconstruction of soil strata within those areas classified as prime agricultural lands." H. R. Rep. No. 95–218, p. 184 (1977).

In our judgment, the evidence summarized in the Reports mandates the conclusion that Congress had a rational basis for finding that surface coal mining on prime farmland affects interstate commerce in agricultural products. As we explained in *Stafford* v. *Wallace*, 258 U. S. 495, 521 (1922):

> "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of danger and meet it. This court will certainly not substitute its judgment for that of Congress unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent."

The court below improperly substituted its judgment for the congressional determination.[14]

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of the House Committee on Interior and Insular Affairs, 95th Cong., 1st Sess., pt. 4, pp. 16–31, 78–92, 159–172, 235–260 (1977) (House Hearings).

[14] Contrary to the District Court's conclusion, it is irrelevant that the Federal Government has in the past paid farmers to refrain from growing crops on certain lands. Such subsidies serve independent goals related to the pricing of agricultural commodities. More important, the affected lands are kept out of production only temporarily, whereas Congress found that unregulated surface mining can be expected to cause long-term or irreversible soil damage.

We also conclude that the court below erred in holding that the prime farmland and 15 other substantive provisions challenged by appellees are not reasonably related to the legitimate goal of protecting interstate commerce from adverse effects attributable to surface coal mining. The court incorrectly assumed that the Act's goals are limited to preventing air and water pollution. As we noted in *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc., ante,* at 277–280, Congress was also concerned about preserving the productive capacity of mined lands and protecting the public from health and safety hazards that may result from surface coal mining. All the provisions invalidated by the court below are reasonably calculated to further these legitimate goals.[15]

For example, the approximate-original-contour requirement in § 515 (b)(5) is designed to avoid the environmental and other harm that may result from unreclaimed or improperly restored mining cuts.[16] As the Senate Committee Report explained:

"If surface mining and reclamation are not done care-

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[15] Even if the District Court was correct in assuming that the Act's sole purpose is controlling air and water pollution that may be caused by surface mining, the court's conclusion that the challenged provisions bear no relation to achievement of this goal would nonetheless be questionable. Along with other provisions of the Act addressing these problems, the provisions at issue contribute to this end. The approximate-original-contour and topsoil replacement requirements, for example, are designed to prevent erosion and sedimentation and thus help preserve water quality. These requirements were among the remedial measures specifically recommended to the House Committee by the United States Army Corps of Engineers for the prevention of further adverse surface mining effects on the Nation's water resources. See House Hearings, pt. 2, at 86.

[16] A representative of the United States Army Corps of Engineers testified at the 1977 House hearings that a National Strip Mine Study prepared by the Corps found that more than 4,400,000 acres of land in the United States have already been disturbed by surface mining and that

> fully, significant environmental damage can result. In addition, unreclaimed or improperly reclaimed surface coal mines pose a continuing threat to the environment, and at times are a danger to public health and safety, public or private property." S. Rep. No. 95–128, p. 50 (1977).

See also *id.*, at 83; H. R. Rep. No. 95–218, *supra*, at 79–80, 93. The same is true of § 508's requirement that applicants for surface mining permits under the permanent program must inform the regulatory authority of the intended postmining use for the land and the manner in which such use will be achieved. This requirement was among the remedial actions specifically recommended to the House Committee by the United States Army Corps of Engineers. The Corps recommended "[a]dvanced submission of mining and reclamation plans to a responsible government agency having authority to grant or deny approval to engage in mining, based upon the information in the plans and the requirements of the regulations." House Hearings, pt. 2, at 86. These requirements obviously enable the regulatory authority to ascertain, before mining begins, whether the prospective mine operator has given adequate consideration to the postmining fate of the land, and whether the operator possesses the technological capability to restore the land in the manner proposed.

Similarly, the relevance of the topsoil-replacement requirement in § 515 (b)(5) to the congressional goal of preserving the productive capacity of mined land should be self-evident. See H. R. Rep. No. 95–218, *supra*, at 106–109. Again, this measure was included among the Corps of Engineers' recom-

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1,900,000 of those acres have not been reclaimed. He further testified that, according to the study, the annual rate of land disturbance by surface mining was 153,000 acres in 1964, and 207,000 acres in 1974. House Hearings, pt. 2, at 69, 83, 90–95. See also S. Rep. No. 95–128, p. 50 (1977).

mendations to the House Committee. The Corps spokesman advised the Committee to require "[s]egregation and preservation of topsoils during, or preceding, mining operations . . . [in order] to provide soil conditions conducive to rapid revegetation after mining . . . ." House Hearings, pt. 2, at 86. Section 522 (e)'s prohibition against mining near churches, schools, parks, public buildings, and occupied dwellings is plainly directed toward ensuring that surface coal mining does not endanger life and property in coal mining communities.

Congress adopted the Surface Mining Act in order to ensure that production of coal for interstate commerce would not be at the expense of agriculture, the environment, or public health and safety, injury to any of which interests would have deleterious effects on interstate commerce. See 30 U. S. C. § 1202 (f) (1976 ed., Supp. III); S. Rep. No. 95–128, *supra*, at 49–53; H. R. Rep. No. 95–218, *supra*, at 57–60. Moreover, as noted in *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, *ante*, at 281–282, the Act reflects the congressional goal of protecting mine operators in States adhering to high performance and reclamation standards from disadvantageous competition with operators in States with less rigorous regulatory programs. See 30 U. S. C. § 1201 (g) (1976 ed., Supp. III). The statutory provisions invalidated by the District Court advance these legitimate goals, and we conclude that Congress acted reasonably in adopting the regulatory scheme contained in the Act.[17]

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[17] Appellees contend that a number of the specific provisions challenged in this case cannot be shown to be related to the congressional goal of preventing adverse effects on interstate commerce. This claim, even if correct, is beside the point. A complex regulatory program such as established by the Act can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 262 (1964);

III

The District Court also held that the 21 substantive statutory provisions discussed above violate the Tenth Amendment because they constitute "displacement or regulation of the management structure and operation of the traditional governmental function of the States in the area of land use control and planning . . . ." 501 F. Supp., at 468. The District Court ruled that the real purpose and effect of the Act is land-use regulation, which, in the court's view, is a traditional state governmental function. The court below, like the District Court in *Virginia Surface Mining*, relied for its Tenth Amendment analysis on this Court's decision in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976).

For the reasons stated in our opinion in *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, *ante*, at 286–293, we hold that the District Court erred in concluding that the challenged provisions of the Act contravene the Tenth Amendment. Like the provisions challenged in *Virginia Surface Mining*, the sections of the Act under attack in this case regulate only the activities of surface mine operators who are private individuals and businesses, and the District Court's conclusion that the Act directly regulates the States as States is untenable. This Court's decision in *National League of Cities* simply is not applicable to this case.[18]

Katzenbach v. *McClung*, 379 U. S. 294, 303–304 (1964). Cf. *Perez* v. *United States*, 402 U. S. 146, 154–156 (1971); *Wickard* v. *Filburn*, 317 U. S. 111, 127–128 (1942); *United States* v. *Darby*, 312 U. S. 100, 123 (1941).

[18] We also do not share the view of the District Court that the Surface Mining Act is a land-use measure after the fashion of the zoning ordinances typically enacted by state and local governments. The prime farmland and other provisions at issue in this case are concerned with regulating the conditions and effects of surface coal mining. Any restrictions on land use that may be imposed by the Act are temporary and incidental to these primary purposes. The Act imposes no restrictions on postreclamation use of mined lands.

IV

The District Court next held that the prime farmland and approximate-original-contour provisions of the Act violate the equal protection and substantive due process guarantees of the Fifth Amendment. The court noted that the Act makes no allowance for variances from the prime farmland requirements, and that variances from the approximate-original-contour provisions are available only for steep-slope and mountaintop operations. The court reasoned that the absence of a variance procedure from these statutory requirements impermissibly discriminates against coal mine operators and States in the Midwest, where there are significant coal reserves located under prime farmland and few or no steep-slope or mountaintop mining operations. Relying on this Court's decision in *Hampton* v. *Mow Sun Wong,* 426 U. S. 88 (1976), the court ruled that this discriminatory treatment could not withstand equal protection scrutiny because it is not justified by "an overriding national interest." 501 F. Supp., at 469. The court further held that both the prime farmland and approximate-original-contour provisions "constitute a deprivation of substantive due process" because they are "irrational, arbitrary and capricious requirements in situations where they are not reasonably necessary to achieve a particular postmining use . . . ." *Ibid.*

Although its decision was couched in terms of the arbitrariness of the challenged provisions, we fear that the court below did no more than substitute its policy judgment for that of Congress. Social and economic legislation like the Surface Mining Act that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose. *Schweiker* v. *Wilson,* 450 U. S. 221 (1981); *U. S. Railroad Retirement Board* v. *Fritz,* 449 U. S. 166 (1980). Moreover, such legislation carries with it a presumption of rationality

that can only be overcome by a clear showing of arbitrariness and irrationality. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S., at 83; *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S., at 15. As the Court explained in *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979), social and economic legislation is valid unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational." This is a heavy burden, and appellees have not carried it.

Neither the court below nor appellees have identified any instance in which the prime farmland or approximate-original-contour provisions have been applied to a mining operation so as to produce an irrational or arbitrary result. More important, even were appellees correct that the challenged provisions impose a greater burden on mine operators in the Midwest, that is no basis for finding the provisions unconstitutional. A claim of arbitrariness cannot rest solely on a statute's lack of uniform geographic impact. *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U. S. 604, 616–619 (1950); *Currin* v. *Wallace*, 306 U. S. 1, 14 (1939). As the Court explained in *Central Roig Refining Co., supra*, at 616:

> "Nor does the Commerce Clause impose requirements of geographic uniformity. . . . Congress may devise . . . a national policy with due regard for the varying and fluctuating interests of different regions."

The characteristics of surface coal mining obviously will vary according to the different geographical conditions present in affected States. Congress has determined that the measures appropriate for steep-slope mines are not necessarily desirable in flatter terrain and prime farmland areas. In allowing variances from the approximate-original-contour requirement applicable to steep-slope mines, Congress may have been influenced by the relative shortage of level land in the steep-

slope areas of the country which does not exist in the flatter terrain areas of the Midwest. Similarly, Congress presumably concluded that allowing variances from the prime farmland provisions would undermine the effort to preserve the productivity of such lands. In our view, Congress acted rationally in drawing these distinctions, and the fact that a particular State has more of one kind of mining operation than another does not establish impermissible discrimination under the Fifth Amendment's Due Process Clause. Furthermore, by invalidating the challenged provisions of the Act under the rubric of "substantive due process," the District Court essentially acted as a superlegislature, passing on the wisdom of congressional policy determinations. In so doing, the court exceeded its proper role. See *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976); *Ferguson* v. *Skrupa*, 372 U. S. 726, 730 (1963).

V

As did its counterpart in *Virginia Surface Mining*, the District Court here ruled that some of the Act's provisions take private property without just compensation in violation of the Fifth Amendment. The court found fault with three of the prime farmland provisions. One is the provision requiring an operator seeking a permit for mining on such land to show that he has the capacity to restore the land, within a reasonable time after the completion of mining, to at least the productivity levels of "non-mined prime farmland in the surrounding area under equivalent levels of management . . . ." § 510 (d)(1), 30 U. S. C. § 1260 (d)(1) (1976 ed., Supp. III). The second provision conditions the release of a mine operator's performance bond on the completion of this restoration. § 519 (c)(2), 30 U. S. C. § 1269 (c)(2) (1976 ed., Supp. III). The third provision directs mine operators to include information about the premining productivity of the land in the reclamation plans they file as part of "prime farmland" permit applications. § 508 (a)(2), 30

U. S. C. § 1258 (a)(2) (1976 ed., Supp. III). The District Court concluded that these three provisions effect an unconstitutional taking of private property because, in the court's view,

> "it is technologically impossible to reclaim prime farmland in a postmining period so that equal or higher levels of yield under high levels of management practice can be achieved." 501 F. Supp., at 470.

The court also ruled that the requirement in § 522 of a procedure for designating areas unsuitable for mining operations, as well as § 522 (e)'s proscription of mining on certain lands and near particular structures, takes private property without just compensation.

In this case as in *Virginia Surface Mining*, appellees' takings claims do not focus on any particular properties to which the challenged provisions have been applied. Similarly, the District Court's ruling did not pertain to the taking of a particular piece of property or the denial of a mining permit for specific prime farmland operations proposed by appellees.[19] Thus, this case resembles *Virginia Surface Mining* in that the only issue properly before the District Court was whether "mere enactment" of the Surface Mining Act ef-

[19] The District Court did find that one of appellee coal companies owns subsurface rights to coal on prime farmland which it "intends to mine . . . in the immediate future." 501 F. Supp., at 470. But even under the District Court's takings analysis, this particular plaintiff's claim is not ripe for judicial determination. For the court held that the Act effects a taking only where it would require a mine operator to demonstrate that it had the capability to restore mined prime farmland to "equal or higher levels of yield under *high levels* of management." *Ibid.* (emphasis added). The court specifically found that mined prime farmland can be restored to the productivity of unmined land under what it described as "*basic levels* of management." *Ibid.* (emphasis added). Since the plaintiff involved did not allege that it was required to demonstrate a capacity to restore the prime farmland to yields under "high levels of management," there could be no basis for the District Court's conclusion that the mine operator's property has been taken by the Act.

fected an unconstitutional taking of private property. For the reasons discussed more fully in *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc., ante,* at 294–297, we conclude that this question must be answered in the negative.

Like the steep-slope provisions reviewed in *Virginia Surface Mining,* the prime farmland provisions do not prohibit surface mining; they merely regulate the conditions under which the activity may be conducted. The prime farmland provisions say nothing about alternative uses to which prime farmland may be put since they come into play only when an operator seeks to conduct mining operations on the land. We therefore conclude that these provisions do not, on their face, deprive a property owner of economically beneficial use of his property.[20]

VI

The court below joined the *Virginia Surface Mining* District Court in holding that the Act's civil penalty provisions deprive coal mine operators of their right to due process. However, like their counterparts in *Virginia Surface Mining,* appellees have made no showing that they were ever assessed civil penalties under the Act, much less that the statutory prepayment requirement was ever applied to them or caused

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[20] The District Court found that "[p]laintiffs coal companies own and/or have rights to and presently intend to mine lands subject to § 522 (e)(4) and/or (5)." *Id.,* at 460. However, in *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc., ante,* at 296, n. 37, we held that the "mere enactment" of § 522 (e) did not effect an unconstitutional taking of the lands to which its restrictions apply. We rely on our discussion in *Virginia Surface Mining* to dispose of the pertinent claims here. We also hold that here, as in *Virginia Surface Mining,* the District Court erred in ruling on the validity of §§ 522 (a), (c), and (d). These provisions, which require procedures for designating areas unsuitable for mining, do not come into effect until the permanent phase of the program, and they have not been applied to appellees or any other landowners in Indiana. In these circumstances, there is no justiciable case or controversy concerning these sections of the Act. See *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc., ante,* at 294, n. 36.

them any injury. As in *Virginia Surface Mining*, we hold that appellees' challenge to these provisions is premature.

VII

Our review of the questions presented by this case leads us to the same conclusion that we reached in *Virginia Surface Mining*. The Surface Mining Act is not vulnerable to appellees' pre-enforcement constitutional challenge. Accordingly, we reverse the judgment of the District Court and remand the case to that court with instructions to dissolve the injunction entered against the Secretary, and for further proceedings consistent with this opinion.

So ordered.

[For concurring statement of THE CHIEF JUSTICE, see *ante*, p. 305.]

[For opinion of JUSTICE REHNQUIST concurring in the judgment, see *ante*, p. 307.]

Syllabus

RHODES, GOVERNOR OF OHIO, ET AL. *v.* CHAPMAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 80-332. Argued March 2, 1981—Decided June 15, 1981

Respondents, who were housed in the same cell in an Ohio maximum-security prison, brought a class action in Federal District Court under 42 U. S. C. § 1983 against petitioner state officials, alleging that "double celling" violated the Constitution and seeking injunctive relief. Despite its generally favorable findings of fact, the District Court concluded that the double celling was cruel and unusual punishment in violation of the Eighth Amendment, as made applicable to the States through the Fourteenth Amendment. This conclusion was based on five considerations: (1) inmates at the prison were serving long terms of imprisonment; (2) the prison housed 38% more inmates than its "design capacity"; (3) the recommendation of several studies that each inmate have at least 50–55 square feet of living quarters as opposed to the 63 square feet shared by the double-celled inmates; (4) the suggestion that double-celled inmates spend most of their time in their cells with their cellmates; and (5) the fact that double celling at the prison was not a temporary condition. The Court of Appeals affirmed.

Held: The double celling in question is not cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. Pp. 344–352.

(a) Conditions of confinement, as constituting the punishment at issue, must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment. But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent such conditions are restrictive and even harsh, they are part of the penalty that criminals pay for their offenses against society. Pp. 345–347.

(b) In view of the District Court's findings of fact, virtually every one of which tends to *refute* respondents' claim, its conclusion that double celling at the prison constituted cruel and unusual punishment is insupportable. Pp. 347–348.

(c) The five considerations on which the District Court relied are

insufficient to support its constitutional conclusion. Such considerations properly are weighed by the legislature and prison administration rather than by a court. They fall far short in themselves of proving cruel and unusual punishment, absent evidence that double celling under the circumstances either inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of the crime warranting imprisonment. Pp. 348–350.

(d) In discharging their oversight responsibility to determine whether prison conditions amount to cruel and unusual punishment, courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the sociological problems of how best to achieve the goals of the penal function in the criminal justice system. Pp. 351–352.

624 F. 2d 1099, reversed.

POWELL, J., delivered the opinion for the Court, in which BURGER, C. J., and STEWART, WHITE, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 352. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 368. MARSHALL, J., filed a dissenting opinion, *post*, p. 369.

Allen P. Adler, Assistant Attorney General of Ohio, argued the cause for petitioners. With him on the briefs were *William J. Brown*, Attorney General, and *Leo J. Conway*, Assistant Attorney General.

Jean P. Kamp argued the cause for respondents. With her on the brief were *Louis A. Jacobs* and *Bruce A. Campbell*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Alaska et al. by *Wilson L. Condon*, Attorney General of Alaska, *Bob Corbin*, Attorney General of Arizona, *J. D. McFarlane*, Attorney General of Colorado, *Carl R. Ajello*, Attorney General of Connecticut, *Richard S. Gebelien*, Attorney General of Delaware, *Jim Smith*, Attorney General of Florida, *Wayne Minami*, Attorney General of Hawaii, *David H. LeRoy*, Attorney General of Idaho, *Tyrone C. Fahner*, Attorney General of Illinois, *Theodore L. Sendak*, Attorney General of Indiana, *Robert T. Stephan*, Attorney General of Kansas, *Steven L. Beshear*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, and *Kendall L. Vick*, Assistant Attorney General, *Warren R. Spannaus*, Attorney General of Minnesota, *Bill Alain*, Attorney General of Mississippi, *John Ashcroft*,

JUSTICE POWELL delivered the opinion of the Court.

The question presented is whether the housing of two inmates in a single cell at the Southern Ohio Correctional Facility is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments.

I

Respondents Kelly Chapman and Richard Jaworski are inmates at the Southern Ohio Correctional Facility (SOCF), a maximum-security state prison in Lucasville, Ohio. They were housed in the same cell when they brought this action in the District Court for the Southern District of Ohio on

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Attorney General of Missouri, *Mike Greely*, Attorney General of Montana, *Paul L. Douglas*, Attorney General of Nebraska, *Richard H. Bryan*, Attorney General of Nevada, *Gregory H. Smith*, Acting Attorney General of New Hampshire, *Rufus L. Edmisten*, Attorney General of North Carolina, *Allen I. Olson*, Attorney General of North Dakota, *Jan Eric Cartwright*, Attorney General of Oklahoma, *James M. Brown*, Attorney General of Oregon, *John R. McCulloch, Jr.*, Solicitor General, *William F. Gary*, Deputy Solicitor General, and *James E. Mountain, Jr.*, and *Jan Peter Londahl*, Assistant Attorneys General, *Dennis J. Roberts II*, Attorney General of Rhode Island, *Daniel R. McLeod*, Attorney General of South Carolina, *Mark V. Meierhenry*, Attorney General of South Dakota, *William M. Leech, Jr.*, Attorney General of Tennessee, *Robert B. Hansen*, Attorney General of Utah, *M. Jerome Diamone*, Attorney General of Vermont, *Marshall Coleman*, Attorney General of Virginia, *Ive Arlington Swan*, Attorney General of the Virgin Islands, *Slade Gorton*, Attorney General of Washington, *Chauncey H. Browning, Jr.*, Attorney General of West Virginia, *Bronson C. La Follette*, Attorney General of Wisconsin, and *John D. Troughton*, Attorney General of Wyoming; and for the State of Texas by *Mark White*, Attorney General, *John W. Fainter, Jr.*, First Assistant Attorney General, *Richard E. Gray III*, Executive Assistant Attorney General, and *W. Barton Boling, Ed Idar, Jr.*, and *Kenneth L. Petersen, Jr.*, Assistant Attorneys General.

Briefs of *amici curiae* urging affirmance were filed by *John A. Krichbaum* for the American Medical Association et al.; and by *Quin Denvir* and *Laurance S. Smith* for the State Public Defender of California.

Solicitor General McCree filed a brief for the United States as *amicus curiae*.

behalf of themselves and all inmates similarly situated at SOCF. Asserting a cause of action under 42 U. S. C. § 1983, they contended that "double celling" at SOCF violated the Constitution. The gravamen of their complaint was that double celling confined cellmates too closely. It also was blamed for overcrowding at SOCF, said to have overwhelmed the prison's facilities and staff.[1] As relief, respondents sought an injunction barring petitioners, who are Ohio officials responsible for the administration of SOCF, from housing more than one inmate in a cell, except as a temporary measure.

The District Court made extensive findings of fact about SOCF on the basis of evidence presented at trial and the court's own observations during an inspection that it conducted without advance notice. 434 F. Supp. 1007 (1977). These findings describe the physical plant, inmate population, and effects of double celling. Neither party contends that these findings are erroneous.

SOCF was built in the early 1970's. In addition to 1,620 cells, it has gymnasiums, workshops, schoolrooms, "dayrooms," two chapels, a hospital ward, commissary, barbershop, and library.[2] Outdoors, SOCF has a recreation field, visitation

[1] As a result of the judgment in respondents' favor, double celling has been substantially eliminated at SOCF. But the increases in Ohio's statewide prison population, which prompted double celling at SOCF, have continued. Furthermore, because SOCF is Ohio's only maximum-security prison, the transfer of some of SOCF's inmates into lesser security prisons has created special problems for the recipient prisons. Tr. of Oral Arg. 5–6. Thus, petitioners have an interest in resuming double celling at SOCF. See *Bell* v. *Wolfish*, 441 U. S. 520, 542–543, n. 25 (1979).

[2] SOCF's library contains 25,000 volumes, including lawbooks, and was described by the District Court as "modern, well-lit," and "superior in quality and quantity." 434 F. Supp., at 1010. The court described SOCF's classrooms as "light, airy, and well equipped." *Id.*, at 1015. The court did not describe SOCF's workshops except to identify them as a laundry, machine shop, shoe factory, sheet metal shop, printshop, sign shop, and engine-repair shop. See *id.*, at 1010.

area, and garden. The District Court described this physical plant as "unquestionably a top-flight, first-class facility." *Id.*, at 1009.

Each cell at SOCF measures approximately 63 square feet. Each contains a bed measuring 36 by 80 inches, a cabinet-type night stand, a wall-mounted sink with hot and cold running water, and a toilet that the inmate can flush from inside the cell. Cells housing two inmates have a two-tiered bunk bed. Every cell has a heating and air circulation vent near the ceiling, and 960 of the cells have a window that inmates can open and close. All of the cells have a cabinet, shelf, and radio built into one of the walls, and in all of the cells one wall consists of bars through which the inmates can be seen.

The "dayrooms" are located adjacent to the cellblocks and are open to inmates between 6:30 a. m. and 9:30 p. m. According to the District Court, "[t]he day rooms are in a sense part of the cells and they are designed to furnish that type of recreation or occupation which an ordinary citizen would seek in his living room or den." *Id.*, at 1012. Each dayroom contains a wall-mounted television, card tables, and chairs. Inmates can pass between their cells and the dayrooms during a 10-minute period each hour, on the hour, when the doors to the dayrooms and cells are opened.

As to the inmate population, the District Court found that SOCF began receiving inmates in late 1972 and double celling them in 1975 because of an increase in Ohio's statewide prison population. At the time of trial, SOCF housed 2,300 inmates, 67% of whom were serving life or other long-term sentences for first-degree felonies. Approximately 1,400 inmates were double celled. Of these, about 75% had the choice of spending much of their waking hours outside their cells, in the dayrooms, school, workshops, library, visits, meals, or showers. The other double-celled inmates spent

more time locked in their cells because of a restrictive classification.[3]

The remaining findings by the District Court addressed respondents' allegation that overcrowding created by double celling overwhelmed SOCF's facilities and staff. The food was "adequate in every respect," and respondents adduced no evidence "whatsoever that prisoners have been underfed or that the food facilities have been taxed by the prison population." *Id.*, at 1014. The air ventilation system was adequate, the cells were substantially free of offensive odor, the temperature in the cellblocks was well controlled, and the noise in the cellblocks was not excessive. Double celling had not reduced significantly the availability of space in the dayrooms or visitation facilities,[4] nor had it rendered inadequate the resources of the library or schoolrooms.[5] Although there were isolated incidents of failure to provide medical or dental care, there was no evidence of indifference by the SOCF staff to inmates' medical or dental needs.[6] As to violence, the court found that the number of acts of violence at

[3] Inmates who requested protective custody but could not substantiate their fears were classified as "limited activity" and were locked in their cells all but six hours a week. Inmates classified as "voluntarily idle" and newly arrived inmates awaiting classification had only four hours a week outside their cells. Inmates housed in administrative isolation for disciplinary reasons were allowed out of their cells for two hours a week to attend religious services, a movie, or the commissary.

[4] The court noted that SOCF is one of the few maximum-security prisons in the country to permit contact visitation for all inmates. *Id.*, at 1014.

[5] The court found that adequate lawbooks were available, even to inmates in protective or disciplinary confinement, to allow effective access to court. As to school, no inmate who was "ready, able, and willing to receive schooling has been denied the opportunity," although there was some delay before an inmate received the opportunity to attend. *Id.*, at 1015.

[6] Turnover in the dental staff had caused a temporary but substantial backlog of inmates needing routine dental care, but the dental staff treated emergencies. *Id.*, at 1016.

SOCF had increased with the prison population, but only in proportion to the increase in population. Respondents failed to produce evidence establishing that double celling itself caused greater violence, and the ratio of guards to inmates at SOCF satisfied the standard of acceptability offered by respondents' expert witness. Finally, the court did find that the SOCF administration, faced with more inmates than jobs, had "water[ed] down" jobs by assigning more inmates to each job than necessary and by reducing the number of hours that each inmate worked, *id.*, at 1015; it also found that SOCF had not increased its staff of psychiatrists and social workers since double celling had begun.

Despite these generally favorable findings, the District Court concluded that double celling at SOCF was cruel and unusual punishment. The court rested its conclusion on five considerations. One, inmates at SOCF are serving long terms of imprisonment. In the court's view, that fact "can only accent[uate] the problems of close confinement and overcrowding." *Id.*, at 1020. Two, SOCF housed 38% more inmates at the time of trial than its "design capacity." In reference to this the court asserted: "Overcrowding necessarily involves excess limitation of general movement as well as physical and mental injury from long exposure." *Ibid.* Three, the court accepted as contemporary standards of decency several studies recommending that each person in an institution have at least 50–55 square feet of living quarters.[7] In contrast, double-celled inmates at SOCF share 63 square feet. Four, the court asserted that "[a]t the best a prisoner who is double celled will spend most of his time in the cell

[7] The District Court cited, *e. g.*, American Correctional Assn., Manual of Standards for Adult Correctional Institutions, Standard No. 4142, p. 27 (1977) (60–80 square feet); National Sheriffs' Assn., A Handbook on Jail Architecture 63 (1975) (70–80 square feet); National Council on Crime and Delinquency, Model Act for the Protection of Rights of Prisoners, § 1, 18 Crime & Delinquency 4, 10 (1972) (50 square feet).

with his cellmate." [8] *Id.*, at 1021. Five, SOCF has made double celling a practice; it is not a temporary condition.[9]

On appeal to the Court of Appeals for the Sixth Circuit, petitioners argued that the District Court's conclusion must be read, in light of its findings, as holding that double celling is *per se* unconstitutional. The Court of Appeals disagreed; it viewed the District Court's opinion as holding only that double celling is cruel and unusual punishment under the circumstances at SOCF. It affirmed, without further opinion, on the ground that the District Court's findings were not clearly erroneous, its conclusions of law were "permissible from the findings," and its remedy was a reasonable response to the violations found.[10]

We granted the petition for certiorari because of the importance of the question to prison administration. 449 U. S. 951 (1980). We now reverse.

II

We consider here for the first time the limitation that the Eighth Amendment, which is applicable to the States through

[8] The basis of the District Court's assertion as to the amount of time that inmates spend in their cells does not appear in the court's opinion. Elsewhere in its opinion, the court found that 75% of the double-celled inmates at SOCF are free to be out of their cells from 6:30 a. m. to 9 p. m. 434 F. Supp., at 1012, 1013. The court stated that it made this finding on the basis of prison regulations on inmate classification, which petitioners submitted as exhibits. *Id.*, at 1012.

[9] Rather than order that petitioners either move respondents into single cells or release them, as respondents urged, the District Court initially ordered petitioners to "proceed with reasonable dispatch to formulate, propose, and carry out some plan which will terminate double celling at SOCF." *Id.*, at 1022. Petitioners submitted five plans, each of which the court rejected. It then ordered petitioners to reduce the inmate population at SOCF by 25 men per month until the population fell to the prison's approximate design capacity of 1,700. App. to Pet. for Cert. A–39.

[10] The Court of Appeals stated its conclusion in a two-paragraph order of affirmance that it filed but did not publish. See 624 F. 2d 1099 (1980).

the Fourteenth Amendment, *Robinson* v. *California*, 370 U. S. 660 (1962), imposes upon the conditions in which a State may confine those convicted of crimes. It is unquestioned that "[c]onfinement in a prison . . . is a form of punishment subject to scrutiny under the Eighth Amendment standards." *Hutto* v. *Finney*, 437 U. S. 678, 685 (1978); see *Ingraham* v. *Wright*, 430 U. S. 651, 669 (1977); cf. *Bell* v. *Wolfish*, 441 U. S. 520 (1979). But until this case, we have not considered a disputed contention that the conditions of confinement at a particular prison constituted cruel and unusual punishment.[11] Nor have we had an occasion to consider specifically the principles relevant to assessing claims that conditions of confinement violate the Eighth Amendment. We look, first, to the Eighth Amendment precedents for the general principles that are relevant to a State's authority to impose punishment for criminal conduct.

A

The Eighth Amendment, in only three words, imposes the constitutional limitation upon punishments: they cannot be "cruel and unusual." The Court has interpreted these words "in a flexible and dynamic manner," *Gregg* v. *Georgia*, 428 U. S. 153, 171 (1976) (joint opinion), and has extended the Amendment's reach beyond the barbarous physical punishments at issue in the Court's earliest cases. See *Wilkerson*

[11] In *Hutto* v. *Finney*, 437 U. S. 678 (1978), the state prison administrators did not dispute the District Court's conclusion that the conditions in two Arkansas prisons constituted cruel and unusual punishment. *Id.*, at 685. In *Ingraham* v. *Wright*, 430 U. S. 651 (1977), the question was whether corporal punishment in a public school constituted cruel and unusual punishment. We held that the Eighth and Fourteenth Amendments do not apply to public school disciplinary practices. In considering the differences between a prisoner and a schoolchild, we stated: "Prison brutality . . . is 'part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny.'" *Id.*, at 669, quoting *Ingraham* v. *Wright*, 525 F. 2d 909, 915 (CA5 1976).

v. *Utah*, 99 U. S. 130 (1879); *In re Kemmler*, 136 U. S. 436 (1890). Today the Eighth Amendment prohibits punishments which, although not physically barbarous, "involve the unnecessary and wanton infliction of pain," *Gregg* v. *Georgia*, *supra*, at 173, or are grossly disproportionate to the severity of the crime, *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion); *Weems* v. *United States*, 217 U. S. 349 (1910).[12] Among "unnecessary and wanton" inflictions of pain are those that are "totally without penological justification." *Gregg* v. *Georgia*, *supra*, at 183; *Estelle* v. *Gamble*, 429 U. S. 97, 103 (1976).

No static "test" can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion). The Court has held, however, that "Eighth Amendment judgments should neither be nor appear to be merely the subjective views" of judges. *Rummel* v. *Estelle*, 445 U. S. 263, 275 (1980). To be sure, "the Constitution contemplates that in the end [a court's] own judgment will be brought to bear on the question of the acceptability" of a given punishment. *Coker* v. *Georgia*, *supra*, at 597 (plurality opinion); *Gregg* v. *Georgia*, *supra*, at 182 (joint opinion). But such " 'judgment[s] should be informed by objective factors to the maximum possible extent.' " *Rummel* v. *Estelle*, *supra*, at 274–275, quoting *Coker* v. *Georgia*, *supra*, at 592 (plurality opinion). For example, when the question was whether capital punishment for certain crimes violated contemporary values, the Court looked for "objective indicia" derived from history, the action of

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[12] The Eighth Amendment also imposes a substantive limit on what can be made criminal and punished as such. *Robinson* v. *California*, 370 U. S. 660 (1962). This aspect of the Eighth Amendment is not involved in this case.

state legislatures, and the sentencing by juries. *Gregg* v. *Georgia, supra,* at 176–187; *Coker* v. *Georgia, supra,* at 593–596. Our conclusion in *Estelle* v. *Gamble, supra,* that deliberate indifference to an inmate's medical needs is cruel and unusual punishment rested on the fact, recognized by the common law and state legislatures, that "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." 429 U. S., at 103.

These principles apply when the conditions of confinement compose the punishment at issue. Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment. In *Estelle* v. *Gamble, supra,* we held that the denial of medical care is cruel and unusual because, in the worst case, it can result in physical torture, and, even in less serious cases, it can result in pain without any penological purpose. 429 U. S., at 103. In *Hutto* v. *Finney, supra,* the conditions of confinement in two Arkansas prisons constituted cruel and unusual punishment because they resulted in unquestioned and serious deprivations of basic human needs. Conditions other than those in *Gamble* and *Hutto,* alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities. Such conditions could be cruel and unusual under the contemporary standard of decency that we recognized in *Gamble, supra,* at 103–104. But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.

B

In view of the District Court's findings of fact, its conclusion that double celling at SOCF constitutes cruel and unusual punishment is insupportable. Virtually every one

of the court's findings tends to *refute* respondents' claim. The double celling made necessary by the unanticipated increase in prison population did not lead to deprivations of essential food, medical care, or sanitation. Nor did it increase violence among inmates or create other conditions intolerable for prison confinement. 434 F. Supp., at 1018. Although job and educational opportunities diminished marginally as a result of double celling, limited work hours and delay before receiving education do not inflict pain, much less unnecessary and wanton pain; deprivations of this kind simply are not punishments. We would have to wrench the Eighth Amendment from its language and history to hold that delay of these desirable aids to rehabilitation violates the Constitution.

The five considerations on which the District Court relied also are insufficient to support its constitutional conclusion. The court relied on the long terms of imprisonment served by inmates at SOCF; the fact that SOCF housed 38% more inmates than its "design capacity"; the recommendation of several studies that each inmate have at least 50–55 square feet of living quarters; the suggestion that double-celled inmates spend most of their time in their cells with their cellmates; and the fact that double celling at SOCF was not a temporary condition. *Supra,* at 343–344. These general considerations fall far short in themselves of proving cruel and unusual punishment, for there is no evidence that double celling under these circumstances either inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment.[13] At most, these con-

[13] Respondents and the District Court erred in assuming that opinions of experts as to desirable prison conditions suffice to establish contemporary standards of decency. As we noted in *Bell* v. *Wolfish,* 441 U. S., at 543–544, n. 27, such opinions may be helpful and relevant with respect to some questions, but "they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question." See U. S. Dept. of Justice, Federal Standards for Prisons and Jails 1 (1980). Indeed, generalized opinions of experts cannot weigh as

siderations amount to a theory that double celling inflicts pain.[14] Perhaps they reflect an aspiration toward an ideal environment for long-term confinement. But the Constitution does not mandate comfortable prisons, and prisons of SOCF's type, which house persons convicted of serious crimes, cannot be free of discomfort. Thus, these considerations properly are weighed by the legislature and prison administration rather than a court. There being no constitutional violation,[15] the District Court had no authority to con-

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heavily in determining contemporary standards of decency as "the public attitude toward a given sanction." *Gregg* v. *Georgia*, 428 U. S. 153, 173 (1976) (joint opinion). We could agree that double celling is not desirable, especially in view of the size of these cells. But there is no evidence in this case that double celling is viewed generally as violating decency. Moreover, though small, the cells in SOCF are exceptionally modern and functional; they are heated and ventilated and have hot and cold running water and a sanitary toilet. Each cell also has a radio. 434 F. Supp., at 1011.

[14] Respondents contend that the close confinement of double celling for long periods creates a dangerous potential for frustration, tension, and violence. In respondents' view, it would be an infliction of unnecessary and wanton pain if double celling led to rioting. The danger of prison riots is a serious concern, shared by the public as well as by prison authorities and inmates. But respondents' contention does not lead to the conclusion that double celling at SOCF is cruel and unusual, whatever may be the situation in a different case. The District Court's findings of fact lend no support to respondents' claim in this case. Moreover, a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators. See *Bell* v. *Wolfish*, *supra*, at 551, and n. 32; *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U. S. 119, 132–133 (1977); *Pell* v. *Procunier*, 417 U. S. 817, 827 (1974).

[15] The dissenting opinion states that "the facility described by [the Court] is not the one involved in this case." *Post*, at 369–370. The incorrectness of this statement is apparent from an examination of the facts set forth at length above, see *supra*, at 340–343, and nn. 2–6, and the District Court's detailed findings of fact. See 434 F. Supp., at 1009–1018.

In several instances, the dissent selectively relies on testimony without acknowledging that the District Court gave it little or no weight. For example, the dissent emphasizes the testimony of experts as to psychological problems that "may be expected" from double celling; it also

sider whether double celling in light of these considerations was the best response to the increase in Ohio's statewide prison population.

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relies on similar testimony as to an increase in tension and aggression. *Id.*, at 1017. The dissent fails to mention, however, that the District Court also referred to the testimony by the prison superintendent and physician that "there has been no increase [in violence] other than what one would expect from increased numbers [of inmates]." *Id.*, at 1018. More telling is the fact—ignored by the dissent—that the District Court resolved this conflict in the testimony by holding "that there had been no increase in violence or criminal activity increase due to double celling; there has been [an increase] due to increased population." *Ibid.* This holding was based on uncontroverted prison records, required to be maintained by the Ohio Department of Corrections and described by the District Court as being "detail[ed] and bespeak[ing] credibility." *Ibid.*

There is some ambiguity in the opinion of the District Court concerning the amount of time that double-celled inmates were required to remain in their cells. The dissent, *post*, at 373, n. 6, relies only on selective findings that most inmates are out of their cells only 10 hours each day, and that others are out only 4–6 hours a week. 434 F. Supp., at 1013. The dissent fails to note that the first of these findings is flatly inconsistent with a prior, twice-repeated, finding by the court that inmates "have to be locked in their cell with their cellmate only from around 9:00 p. m. to 6:30 a. m.," *id.*, at 1013, 1012, leaving them free to move about for some 14 hours. Moreover, it is unquestioned—and also not mentioned by the dissent—that the inmates who spend most of their time locked in their cells are those who have a "restrictive classification." These include inmates found guilty of "rule infractions [after] a plenary hearing" and inmates who "are there by 'choice' (at least to some degree)." *Ibid.* It must be remembered that SOCF is a maximum-security prison, housing only persons guilty of violent and other serious crimes. It is essential to maintain a regime of close supervision and discipline.

The dissent also makes much of the fact that SOCF was housing 38% more inmates at the time of trial than its "rated capacity." According to the United States Bureau of Prisons, at least three factors influence prison population: the number of arrests, prosecution policies, and sentencing and parole decisions. Because these factors can change rapidly, while prisons require years to plan and build, it is extremely difficult to calibrate a prison's "rated" or "design capacity" with predictions of prison population. Memorandum of United States as *Amicus Curiae* 3, 6. The question before us is not whether the designer of SOCF guessed incor-

III

This Court must proceed cautiously in making an Eighth Amendment judgment because, unless we reverse it, "[a] decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment," and thus "[r]evisions cannot be made in the light of further experience." *Gregg* v. *Georgia*, 428 U. S., at 176. In assessing claims that conditions of confinement are cruel and unusual, courts must bear in mind that their inquiries "spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility." *Bell* v. *Wolfish*, 441 U. S., at 539.[16]

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rectly about future prison population, but whether the actual conditions of confinement at SOCF are cruel and unusual.

[16] We have sketched before the magnitude of the problems of prison administration. *Procunier* v. *Martinez*, 416 U. S. 396, 404–405 (1974). See generally National Institute of Justice, American Prisons and Jails (1980) (5 vols.). It suffices here to repeat:

"[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism." *Procunier* v. *Martinez*, *supra*, at 404–405 (footnote omitted).

See also *Wolff* v. *McDonnell*, 418 U. S. 539, 561–562, 568 (1974); *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, at 125.

Since our decision in *Martinez*, the problems of prison population and administration have been exacerbated by the increase of serious crime and the effect of inflation on the resources of States and communities. This case is illustrative. Ohio designed and built SOCF in the early 1970's, and even at the time of trial it was found to be a modern "top-flight, first-class facility." *Supra*, at 341. Yet, an unanticipated increase in the State's prison population compelled the double celling that is at issue.

Courts certainly have a responsibility to scrutinize claims of cruel and unusual confinement, and conditions in a number of prisons, especially older ones, have justly been described as "deplorable" and "sordid." *Bell* v. *Wolfish, supra,* at 562.[17] When conditions of confinement amount to cruel and unusual punishment, "federal courts will discharge their duty to protect constitutional rights." *Procunier* v. *Martinez,* 416 U. S. 396, 405–406 (1974); see *Cruz* v. *Beto,* 405 U. S. 319, 321 (1972) (*per curiam*). In discharging this oversight responsibility, however, courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system: to punish justly, to deter future crime, and to return imprisoned persons to society with an improved chance of being useful, law-abiding citizens.

In this case, the question before us is whether the conditions of confinement at SOCF are cruel and unusual. As we find that they are not, the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, concurring in the judgment.

Today's decision reaffirms that "[c]ourts certainly have a responsibility to scrutinize claims of cruel and unusual confinement." *Ante,* this page. With that I agree. I also agree that the District Court's findings in this case do not support a judgment that the practice of double celling in the South-

[17] Examples of recent federal-court decisions holding prison conditions to be violative of the Eighth and Fourteenth Amendments include *Ramos* v. *Lamm,* 639 F. 2d 559 (CA10 1980), cert. denied, 450 U. S. 1041 (1981); *Williams* v. *Edwards,* 547 F. 2d 1206 (CA5 1977); *Gates* v. *Collier,* 501 F. 2d 1291 (CA5 1974); *Pugh* v. *Locke,* 406 F. Supp. 318 (MD Ala. 1976), aff'd as modified, 559 F. 2d 283 (CA5 1977), rev'd in part on other grounds, 438 U. S. 781 (1978) (*per curiam*).

ern Ohio Correctional Facility is in violation of the Eighth Amendment. I write separately, however, to emphasize that today's decision should in no way be construed as a retreat from careful judicial scrutiny of prison conditions, and to discuss the factors courts should consider in undertaking such scrutiny.

I

Although this Court has never before considered what prison conditions constitute "cruel and unusual punishment" within the meaning of the Eighth Amendment, see *ante*, at 344–345, such questions have been addressed repeatedly by the lower courts. In fact, individual prisons or entire prison systems in at least 24 States have been declared unconstitutional under the Eighth and Fourteenth Amendments,[1] with litiga-

[1] Among the States in which prisons or prison systems have been placed under court order because of conditions of confinement challenged under the Eighth and Fourteenth Amendments are: Alabama, see *Pugh* v. *Locke*, 406 F. Supp. 318 (MD Ala. 1976), aff'd as modified, 559 F. 2d 283 (CA5 1977), rev'd in part on other grounds, 438 U. S. 781 (1978) (*per curiam*); Arizona, see *Harris* v. *Cardwell*, No. CIV–75–185–PHX–CAM (DC Ariz., Oct. 14, 1980) (consent decree); Arkansas, see *Finney* v. *Mabry*, 458 F. Supp. 720 (ED Ark. 1978) (consent decree); Colorado, see *Ramos* v. *Lamm*, 639 F. 2d 559 (CA10 1980), cert. denied, 450 U. S. 1041 (1981); Delaware, see *Anderson* v. *Redman*, 429 F. Supp. 1105 (Del. 1977); Florida, see *Costello* v. *Wainwright*, 397 F. Supp. 20 (MD Fla. 1975), aff'd, 525 F. 2d 1239 (CA5), vacated on rehearing on other grounds, 539 F. 2d 547 (CA5 1976) (en banc), rev'd, 430 U. S. 325, aff'd on remand, 553 F. 2d 506 (CA5 1977) (en banc) (*per curiam*); Georgia, see *Guthrie* v. *Caldwell*, No. 3068 (SD Ga., Dec. 1, 1978) (consent decree); Illinois, see *Lightfoot* v. *Walker*, 486 F. Supp. 504 (SD Ill. 1980); Iowa, see *Watson* v. *Ray*, 90 F. R. D. 143 (SD Iowa 1981); Kentucky, see *Kendrick* v. *Bland*, No. 76–0079–P (WD Ky., Oct. 24, 1980) (consent decree); Louisiana, see *Williams* v. *Edwards*, 547 F. 2d 1206 (CA5 1977); Maryland, see *Johnson* v. *Levine*, 450 F. Supp. 648 (Md.), aff'd in part, 588 F. 2d 1378 (CA4 1978), and *Nelson* v. *Collins*, 455 F. Supp. 727 (Md.), aff'd in part, 588 F. 2d 1378 (CA4 1978); Mississippi, see *Gates* v. *Collier*, 501 F. 2d 1291 (CA5 1974); Missouri, see *Burks* v. *Teasdale*, 603 F. 2d 59 (CA8 1979); New Hampshire, see *Laaman* v. *Helgemoe*, 437 F. Supp. 269 (NH 1977);

tion underway in many others.[2] Thus, the lower courts have learned from repeated investigation and bitter experience that judicial intervention is *indispensable* if constitutional dictates—not to mention considerations of basic humanity—are to be observed in the prisons.

No one familiar with litigation in this area could suggest that the courts have been overeager to usurp the task of running prisons, which, as the Court today properly notes, is entrusted in the first instance to the "legislature and prison administration rather than a court." *Ante*, at 349. And certainly, no one could suppose that the courts have ordered creation of "comfortable prisons," *ibid.*, on the model of country clubs. To the contrary, "the soul-chilling inhumanity of conditions in American prisons has been thrust upon the judicial conscience." *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F. Supp. 676, 684 (Mass. 1973).

Judicial opinions in this area do not make pleasant reading.[3] For example, in *Pugh* v. *Locke*, 406 F. Supp. 318 (MD

New Mexico, see *Duran* v. *Apodaca*, No. Civil 77-721-C (DC NM, July 17, 1980) (consent decree); New York, see *Todaro* v. *Ward*, 565 F. 2d 48 (CA2 1977); Ohio, see (in addition to this case) *Stewart* v. *Rhodes*, 473 F. Supp. 1185 (ED Ohio 1979); Oklahoma, see *Battle* v. *Anderson*, 564 F. 2d 388 (CA10 1977); Oregon, see *Capps* v. *Atiyeh*, 495 F. Supp. 802 (Ore. 1980); Pennsylvania, see *Hendrick* v. *Jackson*, 10 Pa. Commw. 392, 309 A. 2d 187 (1973); Rhode Island, see *Palmigiano* v. *Garrahy*, 443 F. Supp. 956 (RI 1977), remanded, 599 F. 2d 17 (CA1 1979); Tennessee, see *Trigg* v. *Blanton*, No. A-6047 (Ch. Ct., Davidson Cty., Aug. 23, 1978), vacated (Tenn. App., May 1, 1980) (for consideration of changes in conditions), appeal pending (Tenn. Sup. Ct.); Texas, see *Ruiz* v. *Estelle*, 503 F. Supp. 1265 (SD Tex. 1980). See also *Feliciano* v. *Barcelo*, 497 F. Supp. 14 (PR 1979); *Barnes* v. *Government of Virgin Islands*, 415 F. Supp. 1218 (V. I. 1976).

[2] There are over 8,000 pending cases filed by inmates challenging prison conditions. 3 National Institute of Justice, American Prisons and Jails 34 (1980) (hereafter American Prisons and Jails).

[3] It behooves us to remember that

"it is impossible for a written opinion to convey the pernicious conditions and the pain and degradation which ordinary inmates suffer within [un-

Ala. 1976), aff'd as modified, 559 F. 2d 283 (CA5 1977), rev'd in part on other grounds, 438 U. S. 781 (1978) (*per curiam*), Chief Judge Frank Johnson described in gruesome detail the conditions then prevailing in the Alabama penal system. The institutions were "horrendously overcrowded," 406 F. Supp., at 322, to the point where some inmates were forced to sleep on mattresses spread on floors in hallways and next to urinals. *Id.*, at 323. The physical facilities were "dilapidat[ed]" and "filthy," the cells infested with roaches, flies, mosquitoes, and other vermin. *Ibid.* Sanitation facilities were limited and in ill repair, emitting an "overpowering odor"; in one instance over 200 men were forced to share one toilet. *Ibid.* Inmates were not provided with toothpaste, toothbrush, shampoo, shaving cream, razors, combs, or other such necessities. *Ibid.* Food was "unappetizing and unwholesome," poorly prepared and often infested with insects, and served without reasonable utensils. *Ibid.* There were no meaningful vocational, educational, recreational, or work programs. *Id., at* 326. A United States health officer described the prisons as "wholly unfit for human habitation according to virtually every criterion used for evaluation by public health inspectors." *Id.*, at 323–324. Perhaps the worst of all was the "rampant violence" within the prison. *Id.*, at 325. Weaker inmates were "repeatedly victimized" by the stronger; robbery, rape, extortion, theft, and assault were "everyday occurrences among the general inmate population." *Id.*, at 324.

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constitutionally operated prisons]—the gruesome experiences of youthful first offenders forcibly raped; the cruel and justifiable fears of inmates, wondering when they will be called upon to defend the next violent assault; the sheer misery, the discomfort, the wholesale loss of privacy for prisoners housed with one, two, or three others in a forty-five foot cell or suffocatingly packed together in a crowded dormitory; the physical suffering and wretched psychological stress which must be endured by those sick or injured who cannot obtain medical care . . . .

"For those who are incarcerated within [such prisons], these conditions and experiences form the content and essence of daily existence." *Ruiz* v. *Estelle, supra,* at 1391.

Faced with this record, the court—not surprisingly—found that the conditions of confinement constituted cruel and unusual punishment, and issued a comprehensive remedial order affecting virtually every aspect of prison administration.[4]

Unfortunately, the Alabama example is neither abberational nor anachronistic. Last year, in *Ramos* v. *Lamm*, 639 F. 2d 559 (1980), cert. denied, 450 U. S. 1041 (1981), for example, the Tenth Circuit declared conditions in the maximum-security unit of the Colorado State Penitentiary at Canon City unconstitutional. The living areas of the prison were "unfit for human habitation," 639 F. 2d, at 567; the food unsanitary and "grossly inadequate," *id.*, at 570; the institution "fraught with tension and violence," often leading to injury and death, *id.*, at 572; the health care "blatant[ly] inadequat[e]" and "appalling," *id.*, at 574; and there were various restrictions of prisoners' rights to visitation, mail, and access to courts in violation of basic constitutional rights, *id.*, at 578–585. Similar tales of horror are recounted in dozens of other cases. See, *e. g.*, cases cited in n. 1, *supra*.

Overcrowding and cramped living conditions are particularly pressing problems in many prisons. Out of 82 court orders in effect concerning conditions of confinement in federal and state correctional facilities as of March 31, 1978, 26 involved the issue of overcrowding. 3 American Prisons and Jails 32. Two-thirds of all inmates in federal, state, and local correctional facilities were confined in cells or dormitories providing less than 60 square feet per person—the minimal standard deemed acceptable by the American Public Health Association, the Justice Department, and other authorities.[5]

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[4] This Court has upheld the exercise of wide discretion by trial courts to correct conditions of confinement found to be unconstitutional. *Hutto* v. *Finney*, 437 U. S. 678, 687–688 (1978).

[5] See American Public Health Assn., Standards for Health Services in Correctional Institutions 62 (1976); U. S. Dept. of Justice Federal Standards for Prisons and Jails, Standard No. 2.04, p. 17 (1980); see generally 3 American Prisons and Jails 39–50, 85, n. 6.

The problems of administering prisons within constitutional standards are indeed " 'complex and intractable,' " *ante*, at 351, n. 16, quoting *Procunier* v. *Martinez*, 416 U. S. 396, 404 (1974), but at their core is a lack of resources allocated to prisons. Confinement of prisoners is unquestionably an expensive proposition: the average direct current expenditure at adult institutions in 1977 was $5,461 per inmate, 3 American Prisons and Jails 115; the average cost of constructing space for an additional prisoner is estimated at $25,000 to $50,000. *Id.*, at 119. Oftentimes, funding for prisons has been dramatically below that required to comply with basic constitutional standards. For example, to bring the Louisiana prison system into compliance required a supplemental appropriation of $18,431,622 for a single year's operating expenditures, and of $105,605,000 for capital outlays. *Williams* v. *Edwards*, 547 F. 2d 1206, 1219–1221 (CA5 1977) (Exhibit A).

Over the last decade, correctional resources, never ample, have lagged behind burgeoning prison populations. In *Ruiz* v. *Estelle*, 503 F. Supp. 1265 (SD Tex. 1980), for example, the court stated that an "unprecedented surge" in the number of inmates has "undercut any realistic expectation" of eliminating double and triple celling, despite construction of a new $43 million unit. *Id.*, at 1280–1281. The number of inmates in federal and state correctional facilities has risen 42% since 1975, and last year grew at its fastest rate in three years. Krajick, The Boom Resumes, 7 Corrections Magazine 16–17 (Apr. 1981) (report of annual survey of prison populations).[6] A major infusion of money would be required merely to keep pace with prison populations.

[6] Among the causes of the rising number of prison inmates are increasing population, increasing crime rates, stiffer sentencing provisions, and more restrictive parole practices. See Krajick, The Boom Resumes, 7 Corrections Magazine 16–17 (Apr. 1981); 3 National Institute of Law Enforcement and Criminal Justice, The National Manpower Survey of the Criminal Justice System 13–14 (1978).

Public apathy and the political powerlessness of inmates have contributed to the pervasive neglect of the prisons. Chief Judge Henley observed that the people of Arkansas "knew little or nothing about their penal system" prior to the *Holt* litigation, despite "sporadic and sensational" exposés. *Holt* v. *Sarver*, 309 F. Supp. 362, 367 (ED Ark. 1970). Prison inmates are "voteless, politically unpopular, and socially threatening." Morris, The Snail's Pace of Prison Reform, in Proceedings of the 100th Annual Congress of Corrections of the American Correctional Assn. 36, 42 (1970). Thus, the suffering of prisoners, even if known, generally "moves the community in only the most severe and exceptional cases." *Ibid.* As a result even conscientious prison officials are "[c]aught in the middle," as state legislatures refuse "to spend sufficient tax dollars to bring conditions in outdated prisons up to minimally acceptable standards." *Johnson* v. *Levine*, 450 F. Supp. 648, 654 (Md.), aff'd in part, 588 F. 2d 1378 (CA4 1978).[7] After extensive exposure to this

[7] Moreover, part of the problem in some instances is the attitude of politicians and officials. Of course, the courts should not "*assume* that state legislatures and prison officials are insensitive to the requirements of the Constitution," *ante*, at 352 (emphasis added), but sad experience has shown that sometimes they can *in fact* be insensitive to such requirements. See Civil Rights of the Institutionalized, Hearings on S. 10 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 96th Cong., 1st Sess., 28 (1979) (testimony of Assistant Attorney General Drew Days); *Palmigiano* v. *Garrahy*, 448 F. Supp. 659, 671 (RI 1978) (prison officials failed to implement court order for reasons unrelated to ability to comply). William G. Nagel, a New Jersey corrections official for 11 years and now a frequent expert witness in prison litigation, testified in 1977 that, in every one of the 17 lawsuits in which he had participated, the government officials worked in a "systematic way" to "impede the fulfillment of constitutionality within our institutions." Civil Rights of Institutionalized Persons, Hearing on S. 1393 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 95th Cong., 1st Sess., 772 (1977). He stated that he had "learned through experience that most States resist correcting their unconstitutional conditions or operations until pressed to do so by threat of a suit or by direc-

process, Chief Judge Pettine came to view the "barbaric physical conditions" of Rhode Island's prison system as "the ugly and shocking outward manifestations of a deeper dysfunction, an attitude of cynicism, hopelessness, predatory selfishness, and callous indifference that appears to infect, to one degree or another, almost everyone who comes in contact with the [prison]." *Palmigiano* v. *Garrahy*, 443 F. Supp. 956, 984 (RI 1977), remanded, 599 F. 2d 17 (CA1 1979).

Under these circumstances, the courts have emerged as a critical force behind efforts to ameliorate inhumane conditions. Insulated as they are from political pressures, and charged with the duty of enforcing the Constitution, courts are in the strongest position to insist that unconstitutional conditions be remedied, even at significant financial cost. JUSTICE BLACKMUN, then serving on the Court of Appeals, set the tone in *Jackson* v. *Bishop*, 404 F. 2d 571, 580 (CA8 1968): "Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations . . . ."

Progress toward constitutional conditions of confinement in the Nation's prisons has been slow and uneven, despite judicial pressure. Nevertheless, it is clear that judicial intervention has been responsible, not only for remedying some of the worst abuses by direct order, but also for "forcing the legislative branch of government to reevaluate correction policies and to appropriate funds for upgrading penal systems." 3 American Prisons and Jails 163. A detailed study of four prison conditions cases by the American Bar Association concluded:

"The judicial intervention in each of the correctional

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tive from the judiciary." *Id.*, at 779. Indeed, this Court recognized the problem of obstructionist official behavior when it affirmed an award of attorney's fees against Arkansas prison officials who had failed to comply with a court order, on the ground that the litigation had been conducted in bad faith. *Hutto* v. *Finney*, 437 U. S., at 689–693.

law cases studied had impact that was broad and substantial. . . . For the most part, the impact of the judicial intervention was clearly beneficial to the institutions, the correctional systems, and the broader community. Dire consequences predicted by some correctional personnel did not accompany the judicial intervention in the cases studied. Inmates were granted greater rights and protections, but the litigation did not undermine staff authority and control. Institutional conditions improved, but facilities were not turned into 'country clubs.' The courts intervened in correctional affairs, but the judges did not take over administration of the facilities." M. Harris & D. Spiller, After Decision: Implementation of Judicial Decrees in Correctional Settings 21 (National Institute of Law Enforcement and Criminal Justice, 1977).

Even prison officials have acknowledged that judicial intervention has helped them to obtain support for needed reform. GAO, Comptroller General, Report to Congress: The Department of Justice Can Do More to Help Improve Conditions at State and Local Correctional Facilities 12–13 (GGD–80–77, 1980). The Commissioner of Corrections of New York City, a defendant in many lawsuits challenging jail and prison conditions, has stated: "Federal courts may be the last resort for us . . . . If there's going to be change, I think the federal courts are going to have to force cities and states to spend more money on their prisons. . . . I look on the courts as a friend." Gettinger, "Cruel and Unusual" Prisons, 3 Corrections Magazine 3, 5 (Dec. 1977). In a similar vein, the Commissioner of the Minnesota Department of Corrections testified before a congressional Committee that lawsuits brought on behalf of prison inmates

"have upgraded correctional institutions and the development of procedural safeguards regarding basic constitutional rights. There is no question in my mind that

had such court intervention not taken place, these fundamental improvements would not have occurred.

. . . . . .

"While I do not intend to imply here that I sit expectantly at my desk each week awaiting news of another impending suit, I do recognize that unless my agency consistently deals fairly with those incarcerated in our institutions we will be held judicially accountable." Civil Rights of Institutionalized Persons, Hearings on S. 1393 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 95th Cong., 1st Sess., 409–410 (1977) (testimony of Kenneth F. Schoen).[8]

II

The task of the courts in cases challenging prison conditions is to "determine whether a challenged punishment comports with human dignity." *Furman* v. *Georgia*, 408 U. S. 238, 282 (1972) (BRENNAN, J., concurring). Such determinations are necessarily imprecise and indefinite, *Trop* v. *Dulles*, 356 U. S. 86, 100–101 (1958); *Wilkerson* v. *Utah*, 99 U. S. 130, 135–136 (1879); they require careful scrutiny of challenged conditions, and application of realistic yet humane standards.

In performing this responsibility, this Court and the lower

[8] After extensive hearings concerning the effect of court litigation on the correction of unconstitutional conditions in state-operated institutions, Congress emphatically endorsed the role of the courts in the area by passing the Civil Rights of Institutionalized Persons Act, Pub. L. 96–247, 94 Stat. 349, 42 U. S. C. § 1997 *et seq.* (1976 ed., Supp. IV), which authorized the Attorney General to bring suits in federal court on behalf of persons institutionalized by the States under unconstitutional conditions. The Conference Committee noted that, as a result of litigation in which the Justice Department had participated, "conditions have improved significantly in dozens of institutions across the Nation: . . . barbaric treatment of adult and juvenile prisoners has been curbed; . . . and States facing the prospect of suit by the Attorney General have voluntarily upgraded conditions in their institutions . . . to comply with previously announced constitutional standards." H. R. Conf. Rep. No. 96–897, p. 9 (1980).

courts have been especially deferential to prison authorities "in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell* v. *Wolfish*, 441 U. S. 520, 547 (1979); see also *ante*, at 351, n. 16; *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U. S. 119, 128 (1977); *Cruz* v. *Beto*, 405 U. S. 319, 321 (1972). Many conditions of confinement, however, including overcrowding, poor sanitation, and inadequate safety precautions, arise from neglect rather than policy. See *supra*, at 358–359. There is no reason of comity, judicial restraint, or recognition of expertise for courts to defer to negligent omissions of officials who lack the resources or motivation to operate prisons within limits of decency. Courts must and do recognize the primacy of the legislative and executive authorities in the administration of prisons; however, if the prison authorities do not conform to constitutional minima, the courts are under an obligation to take steps to remedy the violations. *Procunier* v. *Martinez*, 416 U. S., at 405.[9]

The first aspect of judicial decisionmaking in this area is scrutiny of the actual conditions under challenge. It is important to recognize that various deficiencies in prison conditions "must be considered together." *Holt* v. *Sarver*, 309 F. Supp., at 373. The individual conditions "exist in combination; each affects the other; and taken together they [may] have a cumulative impact on the inmates." *Ibid.* Thus, a court considering an Eighth Amendment challenge to condi-

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[9] See also *Cruz* v. *Beto*, 405 U. S. 319, 321 (1972):

"Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' including prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes 'access of prisoners to the courts for the purpose of presenting their complaints.'"

tions of confinement must examine the totality of the circumstances.[10] Even if no single condition of confinement would be unconstitutional in itself, "exposure to the cumulative effect of prison conditions may subject inmates to cruel and unusual punishment." *Laaman* v. *Helgemoe*, 437 F. Supp. 269, 322–323 (NH 1977).

Moreover, in seeking relevant information about conditions in a prison, the court must be open to evidence and assistance from many sources, including expert testimony and studies on the effect of particular conditions on prisoners. For this purpose, public health, medical, psychiatric, psychological, penological, architectural, structural, and other experts have proved useful to the lower courts in observing and interpreting prison conditions. See, *e. g.*, *Palmigiano* v. *Garrahy*, 443 F. Supp., at 960 (commenting that the court's "task was made easier by the extensive assistance of experts").[11]

More elusive, perhaps, is the second aspect of the judicial inquiry: application of realistic yet humane standards to the conditions as observed. Courts have expressed these standards in various ways, see, *e. g.*, *M. C. I. Concord Advisory Bd.* v. *Hall*, 447 F. Supp. 398, 404 (Mass. 1978) ("contemporary standards of decency"); *Palmigiano* v. *Garrahy*, *supra*, at 979 (conditions so bad as to "shock the conscience of any reasonable citizen"); *Estelle* v. *Gamble*, 429 U. S. 97, 102 (1976) (" 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency,' " quoting *Jackson* v. *Bishop*, 404 F.

[10] The Court today adopts the totality-of-the-circumstances test. See *ante*, at 347 (Prison conditions *"alone or in combination,* may deprive inmates of the minimal civilized measure of life's necessities") (emphasis added). See also *Hutto* v. *Finney*, 437 U. S., at 687 ("We find no error in the court's conclusion that, *taken as a whole,* conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment") (emphasis added).

[11] I do not understand the Court's opinion to disparage use of experts to assist the courts in these functions. Indeed, the Court acknowledges that expert opinion may be "helpful and relevant" in some circumstances. *Ante*, at 348, n. 13.

2d, at 579). Each of these descriptions has its merit, but in the end, the court attempting to apply them is left to rely upon its own experience and on its knowledge of contemporary standards.[12] *Coker* v. *Georgia*, 433 U. S. 584, 597 (1977) (plurality opinion).

In determining when prison conditions pass beyond legitimate punishment and become cruel and unusual, the "touchstone is the effect upon the imprisoned." *Laaman* v. *Helgemoe*, 437 F. Supp., at 323. The court must examine the effect upon inmates of the condition of the physical plant (lighting, heat, plumbing, ventilation, living space, noise levels, recreation space); sanitation (control of vermin and insects, food preparation, medical facilities, lavatories and showers, clean places for eating, sleeping, and working); safety (protection from violent, deranged, or diseased inmates, fire protection, emergency evacuation); inmate needs and services (clothing, nutrition, bedding, medical, dental, and mental health care, visitation time, exercise and recreation, educational and rehabilitative programming); and staffing (trained and adequate guards and other staff, avoidance of placing inmates in positions of authority over other inmates). See *ibid.*; *Ramos* v. *Lamm*, 639 F. 2d, at 567–581. When "the cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration," the court must conclude that the conditions violate the Constitution. *Laaman* v. *Helgemoe*, *supra*, at 323.

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[12] Again, the assistance of experts can be of great value to courts when evaluating standards for confinement. Although expert testimony alone does not "suffice to establish contemporary standards of decency," *ibid.*, such testimony can help the courts to understand the prevailing norms against which conditions in a particular prison may be evaluated. In this connection, the work of standard-setting organizations such as the Department of Justice, the American Public Health Association, the Commission on Accreditation for Corrections, and the National Sheriff's Association is particularly valuable.

III

A reviewing court is generally limited in its perception of a case to the findings of the trial court. I have not seen the Southern Ohio Correctional Facility at Lucasville, nor have I directly heard evidence concerning conditions there. From the District Court opinion, I know that the prison is a modern, "top-flight, first-class facility," built in the early 1970's at a cost of some $32 million, 434 F. Supp. 1007, 1009 (SD Ohio 1977). Chief Judge Hogan, who toured the facility, described it as "not lacking in color," and, "generally speaking, . . . quite light and . . . airy, etc." *Id.*, at 1011. The cells are reasonably well furnished, with one cabinet-type night stand, one wall cabinet, one wall shelf, one wall-mounted lavatory with hot and cold running water and steel mirror, one china commode flushed from inside the cell, one wall-mounted radio, one heating and air circulation vent, one lighting fixture, and one bed or bunkbed. *Id.*, at 1011–1012. Prisoners in each cellblock have frequent access to a dayroom, which is "in a sense part of the cells," and is "designed to furnish that type of recreation or occupation which an ordinary citizen would seek in his living room or den." *Id.*, at 1012. Food is "adequate in every respect," and the kitchens and dining rooms are clean. *Id.*, at 1014. Prisoners are all permitted contact visitation. *Ibid.* The ratio of inmates to guards is "well within the acceptable ratio," and incidents of violence, while not uncommon, have not increased out of proportion to inmate population. *Id.*, at 1014–1015, 1016–1018. Plumbing and lighting are adequate. *Id.*, at 1015. The prison has a modern, well-stocked library, with an adequate law library. *Id.*, at 1010, and n. 2. It has eight schoolrooms, two chapels, a commissary, a barbershop, dining rooms, kitchens, and workshops. *Ibid.* Virtually the only serious complaint of the inmates at the Southern Ohio Correctional Facility is that 1,280 of the 1,620 cells are used to house two inmates.

I have not the slightest doubt that 63 square feet of cell space is not enough for two men. I understand that every major study of living space in prisons has so concluded. See *id.*, at 1021; see also n. 5, *supra; post,* at 371–372, and n. 4 (MARSHALL, J., dissenting). That prisoners are housed under such conditions is an unmistakable signal to the legislators and officials of Ohio: either more prison facilities should be built or expanded, or fewer persons should be incarcerated in prisons. Even so, the findings of the District Court do not support a conclusion that the conditions at the Southern Ohio Correctional Facility—cramped though they are—constitute cruel and unusual punishment. See *Hite* v. *Leeke,* 564 F. 2d 670, 673–674 (CA4 1977); *M. C. I. Concord Advisory Bd.* v. *Hall,* 447 F. Supp., at 404–405.[13]

The "touchstone" of the Eighth Amendment inquiry is "'the effect upon the imprisoned.'" *Supra,* at 364, quoting *Laaman* v. *Helgemoe,* 437 F. Supp., at 323. The findings of the District Court leave no doubt that the prisoners are adequately sheltered, fed, and protected, and that opportunities for education, work, and rehabilitative assistance are available.[14] One need only compare the District Court's descrip-

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[13] The District Court rested its judgment on five considerations: (1) the long-term confinement of the prisoners, (2) the rated capacity of the prison, (3) expert opinion concerning living-space requirements, (4) time spent in the cells, and (5) the permanent character of the double celling. 434 F. Supp. 1007, 1020–1021 (SD Ohio 1977). This led the Court of Appeals to conclude that the District Court had not ruled the practice of double celling "unconstitutional under all circumstances." App. to Pet. for Cert. A–2. The five considerations cited by the District Court, in my view, are not *separate* aspects of conditions at the prison; rather, they merely embroider upon the theme that double celling is unconstitutional in itself.

[14] The overcrowding in the cells is mitigated considerably by the freedom of most prisoners to spend time away from their cells, especially in the dayrooms. The inhabitants of 960 of the double-occupant cells were out of the cells some 10 hours a day at school, work, or other activities. 434 F. Supp., at 1013. Of the remainder, all of whom spent six or fewer hours a week out of the cells, some were on short-term "receiving" status, some

tion of conditions at the Southern Ohio Correctional Facility with descriptions of other major state and federal facilities, see *supra*, at 354–356, to realize that this prison, crowded though it is, is one of the better, more humane large prisons in the Nation.[15]

The consequence of the District Court's order might well be to make life worse for many Ohio inmates, at least in the short run. As a result of the order, some prisoners have been transferred to the Columbus Correctional Facility, a deteriorating prison nearly 150 years old, itself the subject of litigation over conditions of confinement and under a preliminary order enjoining racially segregative and punitive practices. See *Stewart* v. *Rhodes*, 473 F. Supp. 1185 (SD Ohio 1979).

The District Court may well be correct *in the abstract* that prison overcrowding and double celling such as existed at the Southern Ohio Correctional Facility generally results in serious harm to the inmates. But cases are not decided in the abstract. A court is under the obligation to examine the *actual effect* of challenged conditions upon the well-being of the prisoners.[16] The District Court in this case was unable to identify any actual signs that the double celling at the

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on semiprotected status by choice, and some on "idle" status by choice. *Ibid.* The remainder were in administrative isolation because of infractions of the rules, determined after a plenary hearing. *Ibid.*

During trial in this case, and before final judgment by the District Court, the prison implemented a plan limiting double celling to those inmates free to move about the facility 15 hours per day. Brief for Petitioners 27.

[15] If it were true that any prison providing less than 63 square feet of cell space per inmate were a *per se* violation of the Eighth Amendment, then approximately two-thirds of all federal, state, and local inmates today would be unconstitutionally confined. See *supra*, at 356.

[16] This is not to say that injury to the inmates from challenged prison conditions must be "demonstrate[d] with a high degree of specificity and certainty." *Ruiz* v. *Estelle*, 503 F. Supp., at 1286. Courts may, as usual, employ common sense, observation, expert testimony, and other practical modes of proof. See *id.*, at 1286–1287.

Southern Ohio Correctional Facility has seriously harmed the inmates there;[17] indeed, the court's findings of fact suggest that crowding at the prison has not reached the point of causing serious injury. Since I cannot conclude that the totality of conditions at the facility offends constitutional norms, and am of the view that double celling in itself is not *per se* impermissible, I concur in the judgment of the Court.

JUSTICE BLACKMUN, concurring in the judgment.

Despite the perhaps technically correct observation, *ante*, at 344–345, that the Court is "consider[ing] here for the first time the limitation that the Eighth Amendment . . . imposes upon the conditions in which a State may confine those convicted of crimes," it obviously is not writing upon a clean slate. See *Hutto* v. *Finney*, 437 U. S. 678, 685–688 (1978); cf. *Bell* v. *Wolfish*, 441 U. S. 520 (1979). Already, concerns about prison conditions and their constitutional significance have been expressed by the Court.

Jackson v. *Bishop*, 404 F. 2d 571 (CA8 1968), cited by both JUSTICE BRENNAN, and by JUSTICE MARSHALL in dissent here, was, I believe, one of the first cases in which a federal court examined state penitentiary practices and held them to be violative of the Eighth Amendment's proscription of "cruel and unusual punishments." I sat on that appeal, and I was

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[17] Cf. *Capps* v. *Atiyeh*, 495 F. Supp., at 810–814 (evidence "replete with examples of the deleterious effects of overcrowding on prisoners' mental and physical health," including increased health risks, diminished access to essential services, fewer opportunities to engage in rehabilitative programs, levels of privacy and quiet insufficient for psychological well-being, and exacerbated levels of tension, anxiety, and fear); *Anderson* v. *Redman*, 429 F. Supp., at 1112–1118 (court found that overcrowding had caused severe physical and psychological damage to inmates, increased the incidence of self-multilation, suicide, attempted suicide, theft, assault, and homosexual rape, destroyed all privacy, overtaxed the sanitary facilities, exacerbated the problems of filth, noise, and vermin, caused serious deterioration in medical care, fostered increased idleness, broke down the classification and incentive systems, and demoralized the staff).

privileged to write the opinion for a unanimous panel of the court. My voting in at least one prison case since then further discloses my concern about the conditions that sometimes are imposed upon confined human beings. See, *e. g.*, *United States* v. *Bailey*, 444 U. S. 394, 419, 424 (1980) (dissenting opinion).

I perceive, as JUSTICE BRENNAN obviously does in view of his separate writing, a possibility that the Court's opinion in this case today might be regarded, because of some of its language, as a signal to prison administrators that the federal courts now are to adopt a policy of general deference to such administrators and to state legislatures, deference not only for the purpose of determining contemporary standards of decency, *ante*, at 346, but for the purpose of determining whether conditions at a particular prison are cruel and unusual within the meaning of the Eighth Amendment, *ante*, at 349–352. That perhaps was the old attitude prevalent several decades ago. I join JUSTICE BRENNAN's opinion because I, too, feel that the federal courts must continue to be available to those state inmates who sincerely claim that the conditions to which they are subjected are violative of the Amendment. The Court properly points out in its opinion, *ante*, at 347, that incarceration necessarily, and constitutionally, entails restrictions, discomforts, and a loss of privileges that complete freedom affords. But incarceration is not an open door for unconstitutional cruelty or neglect. Against that kind of penal condition, the Constitution and the federal courts, it is to be hoped, together remain as an available bastion.

JUSTICE MARSHALL, dissenting.

From reading the Court's opinion in this case, one would surely conclude that the Southern Ohio Correctional Facility (SOCF) is a safe, spacious prison that happens to include many two-inmate cells because the State has determined that that is the best way to run the prison. But the facility

described by the majority is not the one involved in this case. SOCF is overcrowded, unhealthful, and dangerous. None of those conditions results from a considered policy judgment on the part of the State. Until the Court's opinion today, absolutely no one—certainly not the "state legislatures" or "prison officials" to whom the majority suggests, see *ante*, at 352, that we defer in analyzing constitutional questions—had suggested that forcing long-term inmates to share tiny cells designed to hold only one individual might be a good thing. On the contrary, as the District Court noted, "everybody" is in agreement that double celling is undesirable.[1] No one argued at trial and no one has contended here that double celling was a legislative policy judgment. No one has asserted that prison officials imposed it as a disciplinary or a security matter. And no one has claimed that the practice has anything whatsoever to do with "punish[ing] justly," "deter[ring] future crime," or "return[ing] imprisoned persons to society with an improved chance of being useful, law-abiding citizens." See *ante*, at 352. The evidence and the District Court's findings clearly demonstrate that the *only* reason double celling was imposed on inmates at SOCF was that more individuals were sent there than the prison was ever designed to hold.[2]

I do not dispute that the state legislature indeed made policy judgments when it built SOCF. It decided that Ohio needed a maximum-security prison that would house some 1,600 inmates. In keeping with prevailing expert opinion, the legislature made the further judgments that each inmate would have his own cell and that each cell would have approximately 63 square feet of floor space. But because of prison overcrowding, hundreds of the cells are shared, or "doubled," which is hardly what the legislature intended.

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[1] "The experts were all in agreement—as is everybody—that single celling is desirable." 434 F. Supp. 1007, 1016 (SD Ohio 1977).

[2] See *id.*, at 1010–1011.

In a doubled cell, each inmate has only some 30–35 square feet of floor space.[3] Most of the windows in the Supreme Court building are larger than that. The conclusion of every expert who testified at trial and of every serious study of which I am aware is that a long-term inmate must have to himself, at the very least, 50 square feet of floor space—an area smaller than that occupied by a good-sized automobile—in order to avoid serious mental, emotional, and physical deterioration.[4] The District Court found that as a fact. 434

[3] The bed alone, which is bunk-style in the doubled cells, takes up approximately 20 square feet. Thus the actual amount of floor space per inmate, without making allowance for any other furniture in the room, is some 20–24 square feet, an area about the size of a typical door.

[4] See, *e. g.*, American Public Health Assn., Standard for Health Services in Correctional Institutions 62 (1976) ("a minimum of 60 sq. ft."); Commission on Accreditation for Corrections, Manual of Standards for Adult Correctional Institutions 27 (1977) ("a floor area of at least 60 square feet"; "[i]n no case should the present use of the facility exceed designed use standards"); 3 National Institute of Justice, American Prisons and Jails 85, n. 6 (1980) ("80 square feet of floor space in long-term institutions"); National Sheriffs' Assn., A Handbook on Jail Architecture 63 (1975) ("[s]ingle occupancy detention rooms should average 70 to 80 square feet in area"); U. S. Dept. of Justice, Federal Standards for Prisons and Jails 17 (1980) ("at least 60 square feet of floor space"); National Council on Crime and Delinquency, Model Act for the Protection of Rights of Prisoners, 18 Crime & Delinquency 4, 10 (1972) ("not less than fifty square feet of floor space in any confined sleeping area"). Most of these studies recommend even more space for inmates who must spend more than 10 hours per day in their cells. One expert witness, a former warden of Rikers Island, testified from his experience that the double celling, if continued over "an awful long stretch of time," could be expected to lead to "assault behavior" and "homosexual occurrences." Tr. 48. He added that "skid row bums" in Bowery flophouses tend to live in healthier surroundings than do double-celled inmates. *Id.*, at 55. As will become apparent, the majority and I disagree over the weight to be given these studies and the expert testimony. But I emphasize that the majority has not pointed to a single witness or study refuting or even contradicting the conclusion of panel after panel of experts that an inmate needs as an absolute minimum 50 square feet of floor space to himself to avoid deterioration of his health.

F. Supp. 1007, 1020–1021 (SD Ohio 1977). Even petitioners, in their brief in this Court, concede that double celling as practiced at SOCF is "less than desirable." Brief for Petitioners 17.

The Eighth Amendment "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency,'" against which conditions of confinement must be judged. *Estelle* v. *Gamble*, 429 U. S. 97, 102 (1976), quoting *Jackson* v. *Bishop*, 404 F. 2d 571, 579 (CA8 1968). Thus the State cannot impose punishment that violates "the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion). For me, the legislative judgment and the consistent conclusions by those who have studied the problem provide considerable evidence that those standards condemn imprisonment in conditions so crowded that serious harm will result. The record amply demonstrates that those conditions are present here. It is surely not disputed that SOCF is severely overcrowded. The prison is operating at 38% above its design capacity.[5] It is also significant that

[5] In my dissenting opinion in *Bell* v. *Wolfish*, 441 U. S. 520, 572, n. 12 (1979), I pointed out that the majority ignored "the rated capacity of the institution" in determining whether the challenged overcrowding was unconstitutional. In its opinion today, the Court at least mentions that SOCF is operating at 38% above its rated capacity, but it dismisses that rating as "[p]erhaps" reflecting "an aspiration toward an ideal environment for long-term confinement." *Ante*, at 349. "The question before us," the majority adds, "is not whether the designer of SOCF guessed incorrectly about future prison population, but whether the actual conditions of confinement at SOCF are cruel and unusual." *Ante*, at 350–351, n. 15. Rated capacity, the majority argues, is irrelevant because of the numerous factors that influence prison population. Actually, it is the factors that influence prison population that are irrelevant. By definition, rated capacity represents "the number of inmates that a confinement unit, facility, or entire correctional agency can hold." 3 National Institute of Justice, American Prisons and Jails 41–42 (1980). If prison population, for whatever reason, exceeds rated capacity, then the prison must accommodate more people than it is designed to hold—in short, it is over-

some two-thirds of the inmates at SOCF are serving lengthy or life sentences, for, as we have said elsewhere, "the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards." *Hutto* v. *Finney*, 437 U. S. 678, 686 (1978). Nor is double celling a short-term response to a temporary problem. The trial court found, and it is not contested, that double celling, if not enjoined, will continue for the foreseeable future. The trial court also found that most of the double-celled inmates spend most of their time in their cells.[6]

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crowded. And the greater the proportion by which prison population exceeds rated capacity, the more severe the overcrowding. I certainly do not suggest that rated capacity is the only factor to be considered in determining whether a prison is unconstitutionally overcrowded, but I fail to understand why the majority feels free to dismiss it entirely.

[6] Although the majority suggests, *ante*, at 344, n. 8, that this finding lacks a clear basis, the trial court also found as a fact that most inmates are out of their cells only 10 hours each day. 434 F. Supp., at 1013. This leaves 14 hours per day inside the cell. The trial court also found that a "substantial number" of inmates are out of their cells for no more than four to six hours *per week*. *Id.*, at 1021.

The majority assumes, *ante*, at 350, n. 15, that the trial court's finding that most inmates are out of their cells only 10 hours each day is "flatly inconsistent" with its finding that regulations permit most inmates to be out of their cells up to 14 hours each day. The majority goes on to reject the first finding in favor of the second. A more reasonable course would be to read these two findings in such a way as to give meaning to both. Thus I read the District Court's opinion as finding that although most inmates are permitted to be out of their cells up to 14 hours each day, conditions in the prison are such that many choose not to do so.

The majority also attaches importance to the fact that the inmates who are locked in their cells for all but four to six hours a week are in a "restrictive classification." *Ibid.* It is not clear to me why this matters. The inmates who are out of their cells only four to six hours each week are in three categories: "receiving," a category in which new inmates are placed for "a couple of weeks"; "voluntarily idle," which presumably means what it says; and "limited activity," for those inmates who have requested, but have not received, protective custody. It is not immediately apparent why classification in any of these categories justifies

It is simply not true, as the majority asserts, that "there is no evidence that double celling under these circumstances either inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment." *Ante*, at 348. The District Court concluded from the record before it that long exposure to these conditions will *"necessarily"* involve "excess limitation of general movement as well as physical and mental injury . . . ." 434 F. Supp., at 1020 (emphasis added).[7] And of course, of all the judges who have been involved in this case, the trial judge is the only one who has actually visited the prison. That is simply an additional reason to give in this case the

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imposition of otherwise cruel and ususual punishment. In particular, the State surely lacks authority to force an individual to choose between possibility of rape or other physical harm (the presumed reason for the request for protective custody) and unconstitutionally cramped quarters. The majority asserts, incorrectly, that some of these inmates have committed rule infractions. *Ibid.* In fact, inmates who commit infractions are out of their cells only *two* hours each week. 434 F. Supp., at 1013. Although this dissent has not addressed their particular plight, it is beyond question that if punishment is cruel and unusual, then the mere fact that an individual prisoner has committed a rule infraction does not warrant its imposition. See *Hutto* v. *Finney*, 437 U. S. 678, 685–688 (1978).

[7] In its findings, the District Court credited expert testimony that "close quarters" would likely increase the incidence of schizophrenia and other mental disorders and that the double celling imposed in this case had led to increases in tension and in "aggressive and anti-social characteristics." 434 F. Supp., at 1017. There is no dispute that the prison was violent even before it became overcrowded, and that it has become more so. Contrary to the contention by the majority, *ante*, at 349–350, n. 15, I do not assert that violence has increased due to *double celling*. I accept the finding of the District Court that violence has increased due to *overcrowding*. See 434 F. Supp., at 1018. Plainly, this case involves much more than just the constitutionality of double celling *per se*. Other federal courts faced with overcrowded conditions have reached similar conclusions. See, *e. g.*, *Campbell* v. *McGruder*, 188 U. S. App. D. C. 258, 273, 580 F. 2d 521, 536 (1978); *Battle* v. *Anderson*, 564 F. 2d 388, 399–401 (CA10 1977); *Detainees of Brooklyn House of Detention* v. *Malcolm*, 520 F. 2d 392, 396, 399 (CA2 1975).

deference we have always accorded to the careful conclusions of the finder of fact. There is not a shred of evidence to suggest that anyone who has given the matter serious thought has ever approved, as the majority does today, conditions of confinement such as those present at SOCF. I see no reason to set aside the concurrent conclusions of two courts that the overcrowding and double celling here in issue are sufficiently severe that they will, if left unchecked, cause deterioration in respondents' mental and physical health. These conditions in my view go well beyond contemporary standards of decency and therefore violate the Eighth and Fourteenth Amendments. I would affirm the judgment of the Court of Appeals.

If the majority did no more than state its disagreement with the courts below over the proper reading of the record, I would end my opinion here. But the Court goes further, adding some unfortunate dicta that may be read as a warning to federal courts against interference with a State's operation of its prisons. If taken too literally, the majority's admonitions might eviscerate the federal courts' traditional role of preventing a State from imposing cruel and unusual punishment through its conditions of confinement.

The majority concedes that federal courts "certainly have a responsibility to scrutinize claims of cruel and unusual confinement," *ante,* at 352, but adds an apparent caveat:

> "In discharging this oversight responsibility, however, courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system: to punish justly, to deter future crime, and to return imprisoned persons to society with an improved chance of being useful, law-abiding citizens." *Ibid.*

As I suggested at the outset, none of this has anything to

do with this case, because no one contends that the State had those goals in mind when it permitted SOCF to become overcrowded. This dictum, moreover, takes far too limited a view of the proper role of a federal court in an Eighth Amendment proceeding and, I add with some regret, far too sanguine a view of the motivations of state legislators and prison officials. Too often, state governments truly are "insensitive to the requirements of the Eighth Amendment," as is evidenced by the repeated need for federal intervention to protect the rights of inmates. See, *e. g.*, *Hutto* v. *Finney*, 437 U. S. 678 (1978) (lengthy periods of punitive isolation); *Estelle* v. *Gamble*, 429 U. S. 97 (1976) (failure to treat inmate's medical needs); *Battle* v. *Anderson*, 564 F. 2d 388 (CA10 1977) (severe overcrowding); *Gates* v. *Collier*, 501 F. 2d 1291 (CA5 1974) (overcrowding and poor housing conditions); *Holt* v. *Sarver*, 442 F. 2d 304 (CA8 1971) (unsafe conditions and inmate abuse); *Pugh* v. *Locke*, 406 F. Supp. 318 (MD Ala. 1976) (constant fear of violence and physical harm), aff'd, 559 F. 2d 283 (CA5 1977), rev'd in part on other grounds, 438 U. S. 781 (1978) (*per curiam*). See also *ante*, at 353–361 (BRENNAN, J., concurring in judgment).[8]

[8] The majority's treatment of the expert evidence in this case also calls for some comment. The Court asserts that expert opinions as to what is desirable in a prison "may be helpful and relevant with respect to some questions" but "'simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question.'" *Ante*, at 348, n. 13, quoting *Bell* v. *Wolfish*, 441 U. S., at 543–544, n. 27. That is more or less a truism, but it plainly does not advance analysis. No one would suggest that a study, no matter how competent, could ever establish a constitutional rule. But once the rule is established, it is surely the case that expert evidence can shed light on whether the rule is violated. Cf. *Brown* v. *Board of Education*, 347 U. S. 483, 494, n. 11 (1954) (using psychological studies to show harm from segregation). Thus even if it is true, as the majority asserts, that the Eighth Amendment forbids only a punishment that "either inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment," *ante*, at 348, surely a court faced with a claim of unconstitutionality would want to know whether anyone had in fact studied the

A society must punish those who transgress its rules. When the offense is severe, the punishment should be of proportionate severity. But the punishment must always be administered within the limitations set down by the Constitution. With the rising crime rates of recent years, there has been an alarming tendency toward a simplistic penological philosophy that if we lock the prison doors and throw away the keys, our streets will somehow be safe. In the current climate, it is unrealistic to expect legislators to care whether the prisons are overcrowded or harmful to inmate health. It is at that point—when conditions are deplorable and the political process offers no redress—that the federal courts are required by the Constitution to play a role. I believe that this vital duty was properly discharged by the District Court and the Court of Appeals in this case. The majority today takes a step toward abandoning that role altogether. I dissent.

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effect of the punishment in issue. Deciding whether that effect was of unconstitutional proportions, and, indeed, whether the study was competently done, would naturally remain the court's function. Here, the trial court deemed the expert opinion presented to it worthy of considerable weight in its assessment of the conditions at SOCF. The majority, however, casts it aside without even a token evaluation of the methodology, content, or results of any of the studies on which the District Court relied. If expert opinion is of as little value as the majority implies, then even plaintiffs with meritorious claims that their conditions of confinement violate the Eighth Amendment will have tremendous difficulty in proving their cases.

NATIONAL GERIMEDICAL HOSPITAL AND GERONTOLOGY CENTER *v.* BLUE CROSS OF KANSAS CITY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80-802. Argued April 29, 1981—Decided June 15, 1981

Prior to the completion of its construction, petitioner, a private, acute-care community hospital in the Kansas City, Mo., metropolitan area, sought to enter into a participating hospital agreement with respondent Blue Cross of Kansas City (Blue Cross), a nonprofit provider of individual and group health-care reimbursement plans in the area. Blue Cross refused on the basis of its policy barring participation by any new hospital that could not show that it was meeting a clearly evident need for health-care services in its service area. Blue Cross relied on petitioner's failure to obtain approval for construction from the Mid-America Health Systems Agency (MAHSA), a private, nonprofit, federally funded corporation which was the local "health system agency" (HSA) designated for the area under the National Health Planning and Resources Development Act of 1974 (NHPRDA). MAHSA's major function is health planning for the Kansas City metropolitan area. Petitioner had not sought approval of its construction from MAHSA because of the latter's announced policy that it would not approve any addition of acute-care beds in view of its determination that there was a surplus of hospital beds in the area. Alleging a wrongful refusal to deal and a conspiracy between Blue Cross and MAHSA, which resulted in a competitive disadvantage to it, petitioner filed suit against respondents Blue Cross and the National Blue Cross Association for violation of the Sherman Act. Respondents contended that the NHPRDA had impliedly repealed the antitrust laws as applied to the conduct in question. The District Court granted judgment for respondents, finding a clear repugnancy between the NHPRDA and the antitrust laws, and congressional intent to repeal the antitrust laws in this context. The Court of Appeals affirmed.

Held: Although respondents may have acted with only the highest motives in seeking to implement the plans of the local HSA, they cannot defeat petitioner's antitrust claim by the assertion of immunity from the requirements of the Sherman Act. Pp. 388-393.

(a) Implied antitrust immunity can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system. Even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry. And intent to repeal the antitrust laws is much clearer when a regulatory agency has been empowered to regulate the type of conduct under antitrust challenge. Pp. 388–389.

(b) The action challenged here was neither compelled nor approved by any governmental regulatory body. Instead, it was a spontaneous response to the finding of only an advisory planning body, the local HSA which, under the NHPRDA, has no regulatory authority over health-care providers. And the application of the antitrust laws to the Blue Cross' conduct would not frustrate a particular provision of the NHPRDA or create a conflict with the orders of any regulatory body. Nor does the NHPRDA require Blue Cross to take an action that, in essence, sought to enforce the advisory decision of MAHSA. There is no reason to believe that Congress specifically contemplated "enforcement" of advisory decisions of an HSA by private insurance providers, let alone relied on such actions to put "teeth" into the noncompulsory local planning process. Pp. 389–391.

(c) And NHPRDA is not so incompatible with antitrust concerns as to create a "pervasive" repeal of the antitrust laws as applied to every action taken in response to the health-care planning process. Respondents have failed to make the showing necessary for an exemption of all such actions. Pp. 391–393.

628 F. 2d 1050, reversed and remanded.

POWELL, J., delivered the opinion for a unanimous Court.

Erwin N. Griswold argued the cause for petitioner. With him on the briefs were *Joe Sims* and *James M. Beck.*

Joshua F. Greenberg argued the cause for respondents. With him on the brief were *Abraham Ribicoff, Richard M. Steuer, Harry P. Thomson, Jr., Jennifer A. Gille, John C. Noonan,* and *Max O. Bagley.*

Solicitor General McCree argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Assistant Attorney General Favretto, Dep-*

uty Solicitor General Wallace, Stephen M. Shapiro, Barry Grossman, and *Andrea Limmer.**

JUSTICE POWELL delivered the opinion of the Court.

The petitioner in this case, National Gerimedical Hospital and Gerontology Center (National Gerimedical) filed an antitrust suit against respondents, Blue Cross of Kansas City (Blue Cross) and the national Blue Cross Association, challenging the refusal of Blue Cross to accept petitioner as a participating member provider under its health insurance plan. The issue presented here is whether this refusal by Blue Cross is immunized from antitrust scrutiny because it was intended to aid implementation of the plans of the "health systems agency" designated for the Kansas City area under the National Health Planning and Resources Development Act of 1974.

I

Petitioner National Gerimedical is a private, acute-care community hospital opened in 1978 in the Kansas City, Mo., metropolitan area.[1] Prior to the completion of construction, petitioner sought to enter into a participating hospital agreement with Blue Cross, a nonprofit provider of individual and group health-care reimbursement plans in Missouri and Kansas. Under such an agreement, participating hospitals receive direct reimbursement of the full costs of covered services rendered to individual Blue Cross subscribers.[2] When subscribers receive care in hospitals that are not participating members, Blue Cross pays only 80% of the cost, and these payments are made to the subscriber, rather than directly to the hospital.

**Carl Weissburg* and *J. Mark Waxman* filed a brief for the Federation of American Hospitals as *amicus curiae* urging reversal.

[1] As a Missouri hospital, petitioner has been licensed by the Missouri Division of Health since September 1977. It also has been certified as a Medicare provider by the Department of Health and Human Services.

[2] All other acute-care hospitals in the Blue Cross service area are participating members.

Blue Cross refused to enter into a participating hospital agreement with petitioner on the basis of its official policy barring participation by any new hospital that could not show that it was meeting "a clearly evident need for health care services in its defined service area."[3] In determining that petitioner had not satisfied this requirement, Blue Cross relied on petitioner's failure to obtain approval for construction from the local "health systems agency" or "HSA"—the Mid-America Health Systems Agency (MAHSA).[4] This agency is a private, nonprofit corporation, federally funded under the National Health Planning and Resources Development Act of 1974 (NHPRDA), 88 Stat. 2229, as amended, 42 U. S. C. § 300*l* (1976 ed. and Supp. IV). Its major function is health planning for the Kansas City metropolitan area.

In conducting its planning functions, MAHSA had determined that there was a surplus of hospital beds in the area

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[3] On January 1, 1976, Blue Cross issued a summary of "Prerequisites" by which it would be guided in deciding whether to accept new participating hospitals. App. 141a. These included the following:

"The hospital must meet a clearly evident need for health care services in its defined service area. Health care institutions and institutional services shall be approved, and/or if required by law, certified as necessary, by the designated planning agency or areawide health planning agency respectively; or, when effective, by the designated State Agency as provided for in Public Law 93–641, the 'National Health Planning and Resources Development Act of 1974.'" *Id.*, at 146a.

Blue Cross added that it retained the final discretion in deciding whether to accept a new hospital, and then included a warning to those contemplating new construction:

"Because lack of knowledge by any applicant of this requirement shall not be considered sufficient reason for waiving it, community groups contemplating construction of new hospitals are urged to consult with Blue Cross, if they expect to apply for participation in the hospital service plan, at some time well in advance of actual construction." *Ibid.*

[4] See n. 3, *supra*. In a newsletter issued on July 21, 1976, Blue Cross announced that "[a]ll projects not reviewed and approved by these Health Systems Agencies will not be reimbursable by Blue Cross of Kansas City." App. 147a.

and had announced that it would not approve any addition of acute-care beds in area hospitals. As a result of this announced policy, petitioner did not seek MAHSA approval of its construction, leading to the refusal of participating hospital status by Blue Cross.

Claiming that this refusal by Blue Cross put it at a competitive disadvantage, petitioner filed suit in the United States District Court for the Western District of Missouri against Blue Cross and the national Blue Cross Association. It claimed violations of §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1, 2, alleging a wrongful refusal to deal and a conspiracy between Blue Cross and MAHSA.[5] As relief, petitioner sought treble damages and an injunction to prevent future violations.

Respondents moved to dismiss the complaint on the ground that the NHPRDA had impliedly repealed the antitrust laws as applied to the conduct in question.[6] The District Court treated this motion as one for summary judgment, and granted judgment for respondents. 479 F. Supp. 1012 (1979). It reasoned that if private parties seeking to effectuate the planning objectives of an HSA could be subjected to antitrust liability, accomplishment of the goals of the NHPRDA would be frustrated. *Id.*, at 1021. Having found a "clear repugnancy," *id.*, at 1024, between this Act and the antitrust laws, the court relied largely on legislative history for the view that "Congress intended that action taken pursuant to the Act and clearly within the scope of the Act would be exempt from application of the antitrust laws," *ibid.*

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[5] MAHSA was not named as a defendant. Petitioner also included claims under Missouri's antitrust laws.

[6] Respondents also argued, unsuccessfully, that their conduct was immune from antitrust attack under the McCarran-Ferguson Act, 15 U. S. C. § 1011 *et seq.*, that their prepaid medical plans are not part of "trade or commerce" within the meaning of the Sherman Act, and that the allegations of conspiracy were insufficient. These claims are not before this Court.

The United States Court of Appeals for the Eighth Circuit affirmed, essentially adopting the reasoning of the District Court. 628 F. 2d 1050 (1980). The Court of Appeals agreed with the District Court's "finding of clear repugnancy between the Act and the antitrust laws, as the Act and regulatory scheme clearly call for the action which has now become the basis of an antitrust claim." *Id.*, at 1055–1056. It then quoted in full the District Court's argument for the view that Congress intended repeal of the antitrust laws in this context.

We granted a writ of certiorari to review this important question. 449 U. S. 1123 (1981).

II

Our decision in this case requires careful attention to the structure and goals of the NHPRDA, as well as a review of this Court's decisions in the area of implied repeals of the antitrust laws. We begin with a description of the complex scheme of regulatory and planning agencies established by the NHPRDA in order to assess the legal significance of that Act with respect to the antitrust claim brought here.

MAHSA, the health systems agency whose refusal to approve new hospital construction in the Kansas City area prompted Blue Cross not to accept petitioner as a participating hospital, is but one part of a larger statutory scheme. The NHPRDA, 42 U. S. C. § 300k *et seq.*, created federal, state, and local bodies that coordinate their activities in the area of health planning and policy. Building on existing planning and development statutes,[7] Congress sought in 1974

[7] See generally S. Rep. No. 93–1285, pp. 4–39 (1974) (hereinafter 1974 Senate Report). In 1972, for example, Congress passed § 1122 of the Social Security Act, 42 U. S. C. § 1320a–1, which authorizes the Secretary of Health and Human Services to enter into agreements with willing States, under which a state agency would be designated as the appropriate body for approving capital expenditures in the health-care area. Under § 1122, federal reimbursements under programs including Medicare and

to create a statutory scheme that would assist in preventing overinvestment in and maldistribution of health facilities. See 1974 Senate Report, at 39.

HSA's such as MAHSA are concerned with health planning in a particular metropolitan area. See generally H. R. Rep. No. 93–1382, pp. 40–41 (1974). Each is a nonprofit private corporation, public regional planning body, or single unit of local government, serving a particular "health service area." 42 U. S. C. § 300*l*–1 (b)(1). The statute requires that a majority of HSA board members be consumers of health care and that at least 40% be health-care "providers." § 300*l*–1 (b)(3)(C). The "primary responsibility" of each HSA is "effective health planning for its health service area and the promotion of the development within the area of health services, manpower, and facilities which meet identified needs, reduce documented inefficiencies, and implement the health plans of the agency." § 300*l*–2 (a). As originally enacted, the Act established four general goals: "improving the health of residents," "increasing the accessibility . . . , acceptability, continuity, and quality of . . . health services," "restraining increases in the cost of . . . health services," and "preventing unnecessary duplication of health resources." § 300*l*–2 (a).[8] To accomplish these goals, the Act requires each HSA to formulate a "detailed statement of goals" called a "health systems plan," § 300*l*–2 (b)(2), an "annual implementation plan" describing the objectives that will achieve the goals of the general plan, § 300*l*–2 (b)(3),

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Medicaid do not include the capital expenses of hospitals that have not received agency approval.

In 1976, Missouri chose not to renew its agreement with the Federal Government under § 1122, thus eliminating the previous state program for approval of hospital construction. Brief for Respondents 6, n. 6.

[8] The Health Planning and Resources Development Amendments of 1979 (1979 Amendments), Pub. L. 96–79, § 103 (c), 93 Stat. 595, added another goal, "preserving and improving . . . competition in the health service area." 42 U. S. C. § 300*l*–2 (a)(5) (1976 ed., Supp. IV).

and "specific plans and projects for achieving the objectives established in the" annual implementation plan, § 300*l*–2 (b)(4). Each HSA is instructed to "seek, to the extent practicable, to implement [its plans] with the assistance of individuals and public and private entities in its health service area." § 300*l*–2 (c)(1). In addition, it may provide "technical assistance" to individuals and public and private entities for the development of necessary projects and programs, § 300*l*–2 (c)(2), and should use grants and contracts to encourage these projects and programs, § 300*l*–2 (c)(3). The agencies do not possess regulatory authority over health-care providers.

At the state level, the Act created two separate bodies. The first, a State Health Planning and Development Agency, is a state agency created by agreement between a Governor and the Federal Government. See § 300m. It is intended to perform certain crucial functions that cannot be undertaken by local HSA's:

> "Specifically, the integration and synthesis of areawide health plans into a Statewide health plan, the establishment of priorities within the State, and the performance of regulatory functions are most appropriately carried out at the State level. The latter function can appropriately be carried out only by an agency of State government." 1974 Senate Report, at 52.

Each state agency must be governed by a "State Program," which the Secretary of Health and Human Services may approve only if it meets guidelines set out in 42 U. S. C. §§ 300m–1, 300m–2. Included in these guidelines is the requirement that each State establish a "certificate of need" program under which all new institutional health facilities must seek state approval prior to construction. § 300m–2 (a)(4)(A).[9] This procedure is "the basic component in an

[9] The Act provides for reductions in various federal grants to States that do not participate in the planning process. 42 U. S. C. § 300m (d).

overall effort to control the unnecessary capital expenditures which contribute so greatly to the total national health bill." S. Rep. No. 96–96, p. 5 (1979) (hereinafter 1979 Senate Report).

The State Health Planning and Development Agency is advised by a Statewide Health Coordinating Council, composed in part of representatives of local HSA's. This council is empowered to review the plans of HSA's, review and revise state plans, and make recommendations with respect to applications for federal funds from HSA's and States. 42 U. S. C. § 300m–3 (c).

In addition to various review functions, the Federal Government plays a separate role in this statutory scheme. The NHPRDA requires the Secretary of Health and Human Services to issue guidelines concerning the appropriate supply, distribution, and organization of health resources. § 300k–1; see 42 CFR § 121.1 *et seq.* (1980). Finally, the Act created a National Council on Health Planning and Development to advise the Secretary on these guidelines and on the general administration of the Act. 42 U. S. C. § 300k–3.

This elaborate planning structure was intended by Congress to remedy perceived deficiencies in the performance of the health-care industry as it existed prior to 1974. The problems addressed fall into two categories. First, there was concern that marketplace forces in this industry failed to produce efficient investment in facilities and to minimize the costs of health care.[10] In addition, Congress sought to reduce the maldistribution of health-care facilities.[11]

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[10] As the 1974 Senate Report put it:

"The need for strengthened and coordinated planning for personal health services is growing more apparent each day. In the view of the Committee the health care industry does not respond to classic marketplace forces. The highly technical nature of medical services together with the growth of third party reimbursement mechanisms act to attenu-

[*Footnote 11 is on p. 387*]

In 1979, Congress amended the NHPRDA substantially in the Health Planning and Resources Development Amendments of 1979, Pub. L. 96–79, 93 Stat. 592. A purpose of these Amendments was to "[d]irect that special consideration be given throughout the planning process to the importance of maintaining and improving competition in the health industry." 1979 Senate Report, at 3.[12] Toward this end, Congress added a number of provisions requiring promotion of competition at the local, state, and federal levels. 42 U. S. C. §§ 300k–2 (b), 300*l*–2 (a)(5) (1976 ed., Supp. IV); 42 U. S. C. §§ 300n–1 (c)(11), (12) (1976 ed., Supp. IV). See generally H. R. Conf. Rep. No. 96–420, p. 58 (1979). In so doing, however, Congress recognized a distinction between areas where competition could serve a useful purpose and

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ate the usual forces influencing the behavior of consumers with respect to personal health services. . . .

"Investment in costly health care resources, such as hospital beds, coronary care units or radio-isotope treatment centers is frequently made without regard to the existence of similar facilities or equipment already operating in an area. Investment in costly facilities and equipment not only results in capital accumulation, but establishes an ongoing demand for payment to support those services. . . .

"A recently published study indicates that by 1975, over 67,000 unneeded hospital beds will be in operation throughout the United States.

"Hospital beds, though unused, contribute substantial additional costs to the health care industry." 1974 Senate Report, at 39.

[11] The 1974 Senate Report stated:

"Widespread access and distribution problems exist with respect to medical facilities and services. In many urban areas, hospitals, clinics and other medical care institutions and services are crowded into relatively tiny sectors, while large areas go poorly served or completely unserved. Many rural communities are completely without a physician or any other type of health care service, while adjacent urban areas are oversupplied." *Ibid.*

[12] The Committee also sought to reduce the threat of domination of HSA decisionmaking by providers with a personal stake in the existing health-care system. 1979 Senate Report, at 57–59. See also Rosenblatt, Health Care Reform and Administrative Law: A Structural Approach, 88 Yale L. J. 243, 304–330 (1978) (describing problems of establishing consumer representation in HSA's).

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those where some other allocation of resources remained necessary.[13]

III

National Gerimedical contends that the denial by Blue Cross of participating hospital status violated the antitrust laws. Blue Cross defends on the ground that it acted pursuant to the local HSA plan and only intended to further the purposes of the NHPRDA. It argues that, despite the absence of any reference to the antitrust laws in the NHPRDA, the creation of the planning structure summarized above implied a repeal of those laws, as applied to this conduct.

On a number of occasions, this Court has faced similar claims of antitrust immunity in the context of various regulated industries. The general principles applicable to such claims are well established. The antitrust laws represent a "fundamental national economic policy." *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213, 218 (1966); see *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 398–399 (1978). "Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *United States* v. *National Association of Securities Dealers*, 422 U. S. 694, 719–720 (1975); see *Gordon* v. *New York Stock Exchange*, 422 U. S. 659, 682 (1975); *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 350–351

[13] In a new subsection, 42 U. S. C. § 300k–2 (b)(1) (1976 ed., Supp. IV), Congress made the finding that "the effect of competition on decisions of providers respecting the supply of health services and facilities is diminished," causing "duplication and excess supply of certain health services and facilities." It added that where "competition appropriately allocates supply consistent with health systems plans and State health plans," planning agencies should "give priority . . . to actions which would strengthen the effect of competition on the supply of such services." § 300k–2 (b)(3). But, for "health services, such as inpatient health services and other institutional health services, for which competition does not or will not appropriately allocate supply," agencies should "take actions . . . to allocate the supply of such services." § 300k–3 (b)(2).

(1963). "Repeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 357 (1963).

To be sure, where Congress did intend to repeal the antitrust laws, that intent governs, *United States* v. *National Association of Securities Dealers, supra; Gordon* v. *New York Stock Exchange, supra,* but this intent must be clear. Even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry. *E. g., Otter Tail Power Co.* v. *United States*, 410 U. S. 366, 372–375 (1973); *United States* v. *Radio Corp. of America*, 358 U. S. 334, 346 (1959). Intent to repeal the antitrust laws is much clearer when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge. *E. g., United States* v. *National Association of Securities Dealers, supra,* at 730–734; *Gordon* v. *New York Stock Exchange, supra,* at 689–690.

In the present case, we must apply these precedents to an industry with a regulatory structure quite different from those considered previously. The action challenged here was neither compelled nor approved by any governmental, regulatory body. Instead, it was a spontaneous response to the finding of an advisory planning body, the local HSA, that there was a surplus of acute-care hospital beds in the Kansas City area.[14] Indeed, when respondents refused to enter into

[14] Significantly, the MAHSA health systems plan only called on insurers to create incentives to hold down the costs of care in *existing* institutions, and made no mention of a role for insurers in restraining unneeded hospital construction. The plan calls on the "reimbursement system [to] promote appropriate utilization of hospital services, provide positive incentives for efficient institutions, actively encourage utilization of less costly but equal quality alternatives to inpatient care, and develop uniform reimbursement programs." App. 67a. But it then asserts that "[c]apital

the agreement with petitioner, the *regulatory* aspects of the NHPRDA—controlled by the state health planning agencies—were not in place in Missouri. There simply was no regulation of this hospital construction, as Missouri had not established any state regulatory agency with authority to review hospital construction.[15]

As a result, the claim of implied antitrust immunity in this case is weaker than in previous cases. It cannot be argued that application of the antitrust laws to the conduct of Blue Cross would frustrate a particular provision of the NHPRDA or create a conflict with the orders of any regulatory body. The record discloses no formal request from MAHSA to Blue Cross to refrain from accepting petitioner as a new participating hospital. Even if such a request had been made, it could not have been more than the advice of a private planning body—albeit a planning body created and funded by the Federal Government. This fact is crucial, because antitrust repeals are especially disfavored where the antitrust implications of a business decision have not been considered by a governmental entity. *United States* v. *Radio Corp. of America, supra,* at 339, 346; cf. *Otter Tail, supra,* at 374 ("When . . . relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws").

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investment in institutions [shall] be controlled by an appropriate review agency." *Ibid.*

[15] See n. 7, *supra.* If it had done so, this case probably would not have arisen. The state agency would have conditioned all hospital construction on issuance of a "certificate of need." See *supra,* at 385–386. Parties pursuing hospital construction without a certificate of need would now be subject to legal penalties. 42 U. S. C. § 300m–2 (a)(4)(A) (1976 ed., Supp. IV).

Missouri subsequently has established a state agency and enacted "certificate of need" legislation. Mo. Rev. Stat. § 197.300 *et seq.* (Supp. 1980).

Respondents rely on the fact that a major function of an HSA is planning in order to eliminate unnecessary duplication of hospital services, 42 U. S. C. § 300*l*–2 (a)(4) (1976 ed., Supp. IV), and point to statutory language requiring each HSA to "seek, to the extent practicable, to implement its [health plans] with the assistance of individuals and public and private entities in its health service area," § 300*l*–2 (c)(1). Here, respondents argue, the HSA found that petitioner was duplicating hospital facilities unnecessarily, and Blue Cross merely sought to aid in the "implementation" of that finding.

We are unpersuaded, however, that the provisions cited by respondents are sufficient to create a "clear repugnancy" between the NHPRDA and the antitrust laws, at least on the facts of this case. See n. 18, *infra*. Nothing in the NHPRDA requires Blue Cross to take an action that, in essence, sought to enforce the advisory decision of MAHSA. HSA's themselves are required to seek private cooperation only "to the extent practicable." 42 U. S. C. § 300*l*–2 (c)(1). And there is no reason to believe that Congress specifically contemplated such "enforcement" by private insurance providers, let alone relied on such actions to put "teeth" into the noncompulsory local planning process. Congress expected HSA planning to be implemented mainly through persuasion and cooperation. If an HSA recommendation could be used to justify antitrust immunity for such an act of private enforcement, this effectively would give that recommendation greater force than Congress intended.[16]

As there is no direct conflict between the requirements of the NHPRDA and the Sherman Act with respect to the conduct at issue here, respondents' only remaining argument must be that the NHPRDA immunizes all private conduct

[16] Congress knew how to give an HSA policy greater legal effect. Under 42 U. S. C. § 300*l*–2 (e) (1976 ed., Supp. IV), HSA approval—subject to review by the Secretary—is required for expenditures of funds under certain federal programs.

undertaken in response to the health planning process. Arguably, the fundamental assumption of Congress, particularly in 1974 when it passed the original Act,[17] was that competition was not a relevant consideration in the health-care industry. If so, although that industry is not regulated in any comprehensive fashion, it might be concluded that Congress intended "pervasive" cooperation and planning without the interference of antitrust suits.

This argument has some force, in light of the prominence Congress gave to the view that "the health care industry does not respond to classic marketplace forces." 1974 Senate Report, at 39. Perhaps it makes little sense in such a context to entertain antitrust suits intended to promote or protect free competition. It is clear, however, that respondents have failed to make the showing necessary for an exemption of all actions of health-care providers taken in response to planning recommendations. In other industrial contexts, we have refused such a blanket exemption, despite a clear congressional finding that some substitution of regulation for competition was necessary. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S., at 217–219 (maritime industry); *Otter Tail*, 410 U. S., at 373–374 (electric power industry). These holdings are based on the guiding principle that, where possible, "the proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Silver*, 373 U. S., at 357. There is no indication that Congress intended a different result with respect to the health-care industry. One manifestation of this is the fact that in the 1979 Amendments Congress did not alter the basic planning structure, even as it made plain its intent that "competition and consumer choice" are to be favored wherever they "can constructively serve . . . to advance the purposes of quality

[17] As noted *supra*, at 387–388, in 1979 competition was given a more prominent place in the thinking of Congress.

assurance, cost effectiveness, and access." 42 U. S. C. § 300k–2 (a)(17) (1976 ed., Supp. IV).[18]

We hold, therefore, that the NHPRDA is not so incompatible with antitrust concerns as to create a "pervasive" repeal of the antitrust laws as applied to every action taken in response to the health-care planning process. Moreover, as discussed above, there was no specific conflict between the Act and the antitrust laws in this case. Although respondents may well have acted here with only the highest of motives in seeking to implement the plans of the local HSA, they cannot defeat petitioner's antitrust claim by the assertion of immunity from the requirements of the Sherman Act.[19] As a result, the judgment below must be reversed and the case remanded.

It is so ordered.

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[18] Nevertheless, because Congress has remained convinced that competition does not operate effectively in some parts of the health-care industry, *e. g.*, 42 U. S. C. § 300k–2 (b) (1976 ed., Supp. IV), we emphasize that our holding does not foreclose future claims of antitrust immunity in other factual contexts. Although favoring a reversal in this case, the United States as *amicus curiae* asserts that "there are some activities that must, by implication, be immune from antitrust attack if HSAs and State Agencies are to exercise their authorized powers." Brief for United States as *Amicus Curiae* 16, n. 11. Where, for example, an HSA has expressly advocated a form of cost-saving cooperation among providers, it may be that antitrust immunity is "necessary to make the [NHPRDA] work." *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 357 (1963). See 124 Cong. Rec. 34932 (1978) (Rep. Rogers) ("The intent of Congress was that HSA's and providers who voluntarily work with them in carrying out the HSA's statutory mandate should not be subject to the antitrust laws. If they were, Public Law 93–641 simply could not be implemented"). Such a case would differ substantially from the present one, where the conduct at issue is not cooperation among providers, but an insurer's refusal to deal with a provider that failed to heed the advice of an HSA.

[19] This holding does not, of course, suggest anything about the merits of the antitrust claim in this case. These matters remain to be litigated on remand, where the court should give attention to the particular economic context in which the alleged conspiracy and "refusal to deal" took place.

FEDERATED DEPARTMENT STORES, INC., ET AL. *v.* MOITIE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-1517. Argued March 30, 1981—Decided June 15, 1981

Seven private antitrust actions (including separate actions by each of the respondents) were brought by plaintiffs seeking to represent classes of retail purchasers against petitioners, owners of various department stores, for alleged price fixing. The actions were consolidated in Federal District Court, which dismissed them for failure to allege an "injury" to the plaintiffs' "business or property" within the meaning of the Clayton Act. Plaintiffs in five of the actions appealed, but respondents chose instead to refile their two actions in state court, making allegations similar to those made in the prior complaints. Petitioners removed these new actions to the District Court, which dismissed them under the doctrine of res judicata, and respondents appealed. Because of this Court's intervening decision in *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, the Court of Appeals thereafter reversed and remanded the five cases which had been initially decided with respondents' first actions, and later reversed the District Court's dismissal of respondents' subsequent actions. The Court of Appeals held that because respondents' position was "closely interwoven" with that of the successfully appealing parties, the doctrine of res judicata must give way to "public policy" and "simple justice."

Held: Res judicata bars relitigation of the unappealed adverse judgments against respondents as to their federal-law claims. The res judicata consequences of a final, unappealed judgment on the merits are not altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. There is no general equitable doctrine which countenances an exception to the finality of a party's failure to appeal merely because his rights are "closely interwoven" with those of another party who successfully appeals. Cf. *Reed* v. *Allen*, 286 U. S. 191. Nor is there any principle of law or equity which sanctions rejection of the salutary principle of res judicata on the basis of "simple justice" or "public policy." "[The] doctrine of *res judicata* is not a mere matter of practice or procedure . . . . It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded

and enforced by the courts . . . ." *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U. S. 294, 299. Pp. 398–402.

611 F. 2d 1267, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and STEVENS, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 402. BRENNAN, J., filed a dissenting opinion, *post*, p. 404.

Jerome I. Chapman argued the cause for petitioners. With him on the briefs were *Abe Krash, Paul Fitting, Charles G. Miller, Eugene H. Gordon, John C. Grosz, Bernard Persky,* and *John Curran Ladd.*

Jerrold N. Offstein argued the cause and filed a brief for respondents.

JUSTICE REHNQUIST delivered the opinion of the Court.

The only question presented in this case is whether the Court of Appeals for the Ninth Circuit validly created an exception to the doctrine of res judicata. The court held that res judicata does not bar relitigation of an unappealed adverse judgment where, as here, other plaintiffs in similar actions against common defendants successfully appeal the judgments against them. We disagree with the view taken by the Court of Appeals for the Ninth Circuit and reverse.

I

In 1976 the United States brought an antitrust action against petitioners, owners of various department stores, alleging that they had violated § 1 of the Sherman Act, 15 U. S. C. § 1, by agreeing to fix the retail price of women's clothing sold in northern California. Seven parallel civil actions were subsequently filed by private plaintiffs seeking treble damages on behalf of proposed classes of retail purchasers, including that of respondent Moitie in state court (*Moitie I*) and respondent Brown (*Brown I*) in the United

States District Court for the Northern District of California. Each of these complaints tracked almost verbatim the allegations of the Government's complaint, though the *Moitie I* complaint referred solely to state law. All of the actions originally filed in the District Court were assigned to a single federal judge, and the *Moitie I* case was removed there on the basis of diversity of citizenship and federal-question jurisdiction. The District Court dismissed all of the actions "in their entirety" on the ground that plaintiffs had not alleged an "injury" to their "business or property" within the meaning of § 4 of the Clayton Act, 15 U. S. C. § 15. *Weinberg* v. *Federated Department Stores*, 426 F. Supp. 880 (1977).

Plaintiffs in five of the suits appealed that judgment to the Court of Appeals for the Ninth Circuit. The single counsel representing Moitie and Brown, however, chose not to appeal and instead refiled the two actions in state court, *Moitie II* and *Brown II*.[1] Although the complaints purported to raise only state-law claims, they made allegations similar to those made in the prior complaints, including that of the Government. Petitioners removed these new actions to the District Court for the Northern District of California and moved to have them dismissed on the ground of res judicata. In a decision rendered July 8, 1977, the District Court first denied respondents' motion to remand. It held that the complaints, though artfully couched in terms of state law, were "in many respects identical" with the prior complaints, and were thus properly removed to federal court because they raised "essentially federal law" claims. The court then concluded that because *Moitie II* and *Brown II* involved the "same parties, the same alleged offenses, and the same time periods" as *Moitie I* and *Brown I*, the doctrine of res judi-

[1] Petitioners have filed a supplemental memorandum with the Court indicating that *Moitie II* has been voluntarily dismissed, leaving *Brown II* as the subject of the petition.

cata required that they be dismissed. This time, Moitie and Brown appealed.

Pending that appeal, this Court on June 11, 1979, decided *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, holding that retail purchasers can suffer an "injury" to their "business or property" as those terms are used in § 4 of the Clayton Act. On June 25, 1979, the Court of Appeals for the Ninth Circuit reversed and remanded the five cases which had been decided with *Moitie I* and *Brown I*, the cases that had been appealed, for further proceedings in light of *Reiter*.

When *Moitie II* and *Brown II* finally came before the Court of Appeals for the Ninth Circuit, the court reversed the decision of the District Court dismissing the cases. 611 F. 2d 1267.[2] Though the court recognized that a "strict application of the doctrine of *res judicata* would preclude our review of the instant decision," *id.*, at 1269, it refused to apply the doctrine to the facts of this case. It observed that the other five litigants in the *Weinberg* cases had successfully

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[2] The Court of Appeals also affirmed the District Court's conclusion that *Brown II* was properly removed to federal court, reasoning that the claims presented were "federal in nature." We agree that at least some of the claims had a sufficient federal character to support removal. As one treatise puts it, courts "will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." 14 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3722, pp. 564–566 (1976) (citing cases) (footnote omitted). The District Court applied that settled principle to the facts of this case. After "an extensive review and analysis of the origins and substance of" the two *Brown* complaints, it found, and the Court of Appeals expressly agreed, that repondents had attempted to avoid removal jurisdiction by "artful[ly]" casting their "essentially federal law claims" as state-law claims. We will not question here that factual finding. See *Prospect Dairy, Inc.* v. *Dellwood Dairy Co.*, 237 F. Supp. 176 (NDNY 1964); *In re Wiring Device Antitrust Litigation*, 498 F. Supp. 79 (EDNY 1980); *Three J Farms, Inc.* v. *Alton Box Board Co.*, 1979–1 Trade Cases ¶ 62,423 (SC 1978), rev'd on other grounds, 609 F. 2d 112 (CA4 1979), cert. denied, 445 U. S. 911 (1980).

appealed the decision against them. It then asserted that "non-appealing parties may benefit from a reversal when their position is closely interwoven with that of appealing parties," *ibid.*, and concluded that "[b]ecause the instant dismissal rested on a case that has been effectively overruled," the doctrine of res judicata must give way to "public policy" and "simple justice." *Id.*, at 1269–1270. We granted certiorari, 449 U. S. 991 (1980), to consider the validity of the Court of Appeals' novel exception to the doctrine of res judicata.

II

There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Commissioner* v. *Sunnen*, 333 U. S. 591, 597 (1948); *Cromwell* v. *County of Sac*, 94 U. S. 351, 352–353 (1877). Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. *Angel* v. *Bullington*, 330 U. S. 183, 187 (1947); *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1940); *Wilson's Executor* v. *Deen*, 121 U. S. 525, 534 (1887). As this Court explained in *Baltimore S.S. Co.* v. *Phillips*, 274 U. S. 316, 325 (1927), an "erroneous conclusion" reached by the court in the first suit does not deprive the defendants in the second action "of their right to rely upon the plea of *res judicata*. . . . A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action]." We have observed that "[t]he indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judg-

ments, consequences which it was the very purpose of the doctrine of *res judicata* to avert." *Reed* v. *Allen,* 286 U. S. 191, 201 (1932).

In this case, the Court of Appeals conceded that the "strict application of the doctrine of *res judicata*" required that *Brown II* be dismissed. By that, the court presumably meant that the "technical elements" of res judicata had been satisfied, namely, that the decision in *Brown I* was a final judgment on the merits and involved the same claims and the same parties as *Brown II*.[3] The court, however, declined to dismiss *Brown II* because, in its view, it would be unfair to bar respondents from relitigating a claim so "closely interwoven" with that of the successfully appealing parties. We believe that such an unprecedented departure from accepted principles of res judicata is unwarranted. Indeed, the decision below is all but foreclosed by our prior case law.[4]

In *Reed* v. *Allen, supra,* this Court addressed the issue presented here. The case involved a dispute over the rights to property left in a will. *A* won an interpleader action for rents derived from the property and, while an appeal was pending, brought an ejectment action against the rival claimant *B*. On

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[3] The dismissal for failure to state a claim under Federal Rule of Civil Procedure 12 (b) (6) is a "judgment on the merits." See *Angel* v. *Bullington,* 330 U. S. 183, 190 (1947); *Bell* v. *Hood,* 327 U. S. 678 (1946).

[4] The decision below also conflicts with those of other Courts of Appeals holding that an adverse judgment from which no appeal has been taken is res judicata and bars any future action on the same claim, even if an authoritative contrary judicial decision on the legal issues involved is subsequently rendered in another case. *E. g., National Association of Broadcasters* v. *FCC,* 180 U. S. App. D. C. 259, 265, 554 F. 2d 1118, 1124 (1976) ("It is the generally accepted rule in civil cases that where less than all of the several co-parties appeal from an adverse judgment, a reversal as to the parties appealing does not necessitate or justify a reversal as to the parties not appealing"); *Clouatre* v. *Houston Fire & Cas. Co.,* 229 F. 2d 596, 597–598 (CA5 1956); *Appleton Toy & Furniture Co.* v. *Lehman Co.,* 165 F. 2d 801, 802 (CA7 1948); *Ripperger* v. *A. C. Allyn & Co.,* 113 F. 2d 332, 333 (CA2), cert. denied, 311 U. S. 695 (1940).

the basis of the decree in the interpleader suit *A* won the ejectment action. *B* did not appeal this judgment, but prevailed on his earlier appeal from the interpleader decree and was awarded the rents which had been collected. When *B* sought to bring an ejectment action against *A*, the latter pleaded res judicata, based on his previous successful ejectment action. This Court held that res judicata was available as a defense and that the property belonged to *A*:

> "The judgment in the ejectment action was final and not open to assault collaterally, but subject to impeachment only through some form of direct attack. The appellate court was limited to a review of the interpleader decree; and it is hardly necessary to say that jurisdiction to review one judgment gives an appellate court no power to reverse or modify another and independent judgment. If respondent, in addition to appealing from the [interpleader] decree, had appealed from the [ejectment] judgment, the appellate court, having both cases before it, might have afforded a remedy. . . . But this course respondent neglected to follow." *Id.*, at 198.

This Court's rigorous application of res judicata in *Reed*, to the point of leaving one party in possession and the other party entitled to the rents, makes clear that this Court recognizes no general equitable doctrine, such as that suggested by the Court of Appeals, which countenances an exception to the finality of a party's failure to appeal merely because his rights are "closely interwoven" with those of another party. Indeed, this case presents even more compelling reasons to apply the doctrine of res judicata than did *Reed*. Respondents here seek to be the windfall beneficiaries of an appellate reversal procured by other independent parties, who have no interest in respondents' case, not a reversal in interrelated cases procured, as in *Reed*, by the same affected party. Moreover, in contrast to *Reed*, where it was unclear why no appeal was taken, it is apparent that respondents here made a

calculated choice to forgo their appeals. See also *Ackermann* v. *United States*, 340 U. S. 193, 198 (1950) (holding that petitioners were not entitled to relief under Federal Rule of Civil Procedure 60 (b) when they made a "free, calculated, deliberate choic[e]" not to appeal).

The Court of Appeals also rested its opinion in part on what it viewed as "simple justice." But we do not see the grave injustice which would be done by the application of accepted principles of res judicata. "Simple justice" is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*." *Heiser* v. *Woodruff*, 327 U. S. 726, 733 (1946). The Court of Appeals' reliance on "public policy" is similarly misplaced. This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin* v. *Traveling Men's Assn.*, 283 U. S. 522, 525 (1931). We have stressed that "[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts . . . ." *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U. S. 294, 299 (1917). The language used by this Court half a century ago is even more compelling in view of today's crowded dockets:

> "The predicament in which respondent finds himself is of his own making . . . . [W]e cannot be expected, for his sole relief, to upset the general and well-established doctrine of *res judicata*, conceived in the light of the

maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy. And the mischief which would follow the establishment of precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship." *Reed* v. *Allen*, 286 U. S., at 198–199.

Respondents make no serious effort to defend the decision of the Court of Appeals. They do not ask that the decision below be affirmed. Instead, they conclude that the "the writ of certiorari should be dismissed as improvidently granted." Brief for Respondents 31. In the alternative, they argue that "the district court's dismissal on grounds of res judicata should be reversed, and the district court directed to grant respondent's motion to remand to the California state court." *Ibid.* In their view, *Brown I* cannot be considered res judicata as to their *state*-law claims, since *Brown I* raised only federal-law claims and *Brown II* raised additional state-law claims not decided in *Brown I*, such as unfair competition, fraud, and restitution.

It is unnecessary for this Court to reach that issue. It is enough for our decision here that *Brown I* is res judicata as to respondents' federal-law claims. Accordingly, the judgment of the Court of Appeals is reversed, and the cause is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins, concurring in the judgment.

While I agree with the result reached in this case, I write separately to state my views on two points.

First, I, for one, would not close the door upon the possibility that there are cases in which the doctrine of res judi-

cata must give way to what the Court of Appeals referred to as "overriding concerns of public policy and simple justice." 611 F. 2d 1267, 1269 (CA9 1980). Professor Moore has noted: "Just as res judicata is occasionally qualified by an overriding, competing principle of public policy, so occasionally it needs an equitable tempering." 1B J. Moore & T. Currier, Moore's Federal Practice ¶ 0.405 [12], p. 791 (1980) (footnote omitted). See also *Reed* v. *Allen*, 286 U. S. 191, 209 (1932) (Cardozo, J., joined by Brandeis and Stone, JJ., dissenting) ("A system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity"). But this case is clearly not one in which equity requires that the doctrine give way. Unlike the nonappealing party in *Reed*, respondents were not "caught in a mesh of procedural complexities." *Ibid.* Instead, they made a deliberate tactical decision not to appeal. Nor would public policy be served by making an exception to the doctrine in this case; to the contrary, there is a special need for strict application of res judicata in complex multiple party actions of this sort so as to discourage "break-away" litigation. Cf. *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 345 (1979). Finally, this is not a case "where the rights of appealing and non-appealing parties are so interwoven or dependent on each other as to require a reversal of the whole judgment when a part thereof is reversed." See *Ford Motor Credit Co.* v. *Uresti*, 581 S. W. 2d 298, 300 (Tex. Civ. App. 1979).*

*The Court of Appeals' reliance, 611 F. 2d 1267, 1269 (CA9 1980), on *Uresti*; *Kvenild* v. *Taylor*, 594 P. 2d 972 (Wyo. 1979); and *In re Estate of McDill*, 14 Cal. 3d 831, 537 P. 2d 874 (1975), appears to me to be clearly misplaced. Unlike those cases, this is not one in which the appealing and nonappealing parties made competing claims to a single piece of property, see *McDill*, or in which reversal only as to the appealing party would have unjustly left the nonappealing party liable, see *Kvenild*, or without recourse on his cross-claim, see *Uresti*.

Second, and in contrast, I would flatly hold that *Brown I* is res judicata as to respondents' state-law claims. Like the District Court, the Court of Appeals found that those state-law claims were simply disguised federal claims; since respondents have not cross-petitioned from that judgment, their argument that this case should be remanded to state court should be itself barred by res judicata. More important, even if the state and federal claims are distinct, respondents' failure to allege the state claims in *Brown I* manifestly bars their allegation in *Brown II*. The dismissal of *Brown I* is res judicata not only as to all claims respondents actually raised, but also as to all claims that could have been raised. See *Commissioner* v. *Sunnen*, 333 U. S. 591, 597 (1948); Restatement (Second) of Judgments § 61.1 (Tent. Draft No. 5, Mar. 10, 1978). Since there is no reason to believe that it was clear at the outset of this litigation that the District Court would have declined to exercise pendent jurisdiction over state claims, respondents were obligated to plead those claims if they wished to preserve them. See *id.*, § 61.1, Comment *e*. Because they did not do so, I would hold the claims barred.

JUSTICE BRENNAN, dissenting.

In its eagerness to correct the decision of the Court of Appeals for the Ninth Circuit, the Court today disregards statutory restrictions on federal-court jurisdiction, and, in the process, confuses rather than clarifies long-established principles of res judicata. I therefore respectfully dissent.

I

Respondent Floyd R. Brown [1] filed this class action (*Brown II*) against petitioners in California state court. The com-

[1] Since the action by respondent Moitie has been voluntarily dismissed, the only remaining issues concern the claims of respondent Brown.

plaint stated four state-law causes of action: (1) fraud and deceit, (2) unfair business practices, (3) civil conspiracy, and (4) restitution. Plaintiffs' Complaint, ¶¶ 11–14, App. 99–101. It alleged "not less than $600" damages per class member, and in addition sought "appropriate multiple damages," exemplary and punitive damages, interest from date of injury, attorney's fees and costs, and other relief. *Id.*, at 101–102. *All four* of the causes of action rested wholly on California statutory or common law; *none* rested in any fashion on federal law.

Nonetheless, petitioners removed the suit to the United States District Court for the Northern District of California, where respondent Brown filed a motion to remand on the ground that his action raised no federal question within the meaning of 28 U. S. C. § 1441 (b). Respondent's motion was denied by the District Court, which stated that "[f]rom start to finish, plaintiffs have essentially alleged violations by defendants of federal antitrust laws." App. 192. The court reasoned that "[a]rtful pleading" by plaintiffs cannot "convert their essentially federal law claims into state law claims," and held that respondent's complaint was properly removed "because [it] concerned federal questions which could have been originally brought in Federal District Court without satisfying any minimum amount in controversy." *Ibid.* The court then dismissed the action, holding that, under the doctrine of res judicata, *Brown II* was barred by the adverse decision in an earlier suit in federal court (*Brown I*) involving "the same parties, the same alleged offenses, and the same time periods." *Ibid.*

The Court of Appeals affirmed the District Court's decision not to remand, stating that "[t]he court below correctly held that the claims presented were federal in nature." 611 F. 2d 1267, 1268 (CA9 1980) (memorandum on denial of reconsideration). However, the Court of Appeals reversed the District Court's order of dismissal, and remanded for trial.

II

The provision authorizing removal of actions from state to federal courts on the basis of a federal question [2] is found in 28 U. S. C. § 1441 (b):

> "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."

Removability depends solely upon the nature of the plaintiff's complaint: an action may be removed to federal court only if a "right or immunity created by the Constitution or laws of the United States [constitutes] an element, and an essential one, of the plaintiff's cause of action." *Gully* v. *First National Bank in Meridian*, 299 U. S. 109, 112 (1936). An action arising under state law may not be removed solely because a federal right or immunity is raised as a defense. *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454 (1894).

An important corollary is that "the party who brings a suit is master to decide what law he will rely upon and therefore does determine whether he will bring a 'suit arising under' the . . . law[s] of the United States" by the allegations in his complaint. *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25 (1913); accord, *Great Northern R. Co.* v. *Alexander*, 246 U. S. 276, 282 (1918). Where the plaintiff's claim might

[2] As the District Court acknowledged, *Brown II* could not be removed on the basis of diversity of citizenship, because the amount in controversy did not exceed $10,000. App. 190. The court correctly noted, however, that the action could have been removed without regard to the amount in controversy, if it could have been brought as an original action in federal court without meeting any minimum amount in controversy. *Ibid.* Actions under the Clayton Act, 15 U. S. C. § 15, may be brought in federal court without regard to amount in controversy. See also Pub. L. 96–486, §§ 2 (a), 4, 94 Stat. 2369–2370, 28 U. S. C. § 1331 (1976 ed., Supp. IV), and note following § 1331 (repeal of minimum amount in controversy for federal-question cases pending as of date of enactment).

be brought under either federal or state law, the plaintiff is normally free to ignore the federal question and rest his claim solely on the state ground. If he does so, the defendant has no general right of removal. *Jones* v. *General Tire & Rubber Co.*, 541 F. 2d 660, 664–665 (CA7 1976); *La Chemise Lacoste* v. *Alligator Co.*, 506 F. 2d 339, 346 (CA3 1974), cert. denied, 421 U. S. 937 (1975); *Warner Bros. Records, Inc.* v. *R. A. Ridges Distributing Co.*, 475 F. 2d 262, 264 (CA10 1973); *Coditron Corp.* v. *AFA Protective Systems, Inc.*, 392 F. Supp. 158, 160 (SDNY 1975).

This corollary is well grounded in principles of federalism. So long as States retain authority to legislate in subject areas in which Congress has legislated without pre-empting the field, and so long as state courts remain the preferred forum for interpretation and enforcement of state law, plaintiffs must be permitted to proceed in state court under state law. It would do violence to state autonomy were defendants able to remove state claims to federal court merely because the plaintiff *could have* asserted a federal claim based on the same set of facts underlying his state claim. As this Court stated in *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U. S. 100, 108–109 (1941):

> "The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'" (Quoting *Healy* v. *Ratta*, 292 U. S. 263, 270 (1934).)

The general rule that a plaintiff basing his claim solely on state law thereby avoids removal applies only where state substantive law has not been pre-empted by federal law.

"[W]here the plaintiff has a right to relief *either* under

federal law *or* under state law as an independent source of that right, the federal court on removal proceedings may not generally look beyond the face of the initial pleading in the state action to determine whether a federal question is presented. In certain areas, however, this either-or option is no longer available, for Congress has deemed that federal substantive law should altogether preempt and supplant state law. In such a case, where Congress has explicitly said that the exclusive source of a plaintiff's right to relief is to be federal law, it would be unacceptable to permit that very plaintiff, by the artful manipulation of the terms of a complaint, to defeat a clearly enunciated congressional objective." *Hearst Corp.* v. *Shopping Center Network, Inc.*, 307 F. Supp. 551, 556 (SDNY 1969) (emphasis in original) (citation omitted).

The federal court must therefore scrutinize the complaint in the removed case to determine whether the action, though ostensibly grounded solely on state law, is actually grounded on a claim in which federal law is the exclusive authority. See *Sheeran* v. *General Electric Co.*, 593 F. 2d 93, 96 (CA9), cert. denied, 444 U. S. 868 (1979); *North American Phillips Corp.* v. *Emery Air Freight Corp.*, 579 F. 2d 229, 233–234 (CA2 1978); *New York* v. *Local 144, Hotel Nursing Home and Allied Health Services Union*, 410 F. Supp. 225, 226–229 (SDNY 1976).[3]

[3] In this context, it is often said that a plaintiff may not "fraudulently" defeat removal by manipulation of the complaint. See, *e. g.*, *Sheeran* v. *General Electric Co.*, 593 F. 2d, at 96; *Jones* v. *General Tire & Rubber Co.*, 541 F. 2d 660, 664–665 (CA7 1976); see also *Great Northern R. Co.* v. *Alexander*, 246 U. S. 276, 281, 282 (1918). Where, however, both state and federal laws would support a claim, it makes little sense to suggest that the plaintiff acts "fraudulently" if he chooses to proceed under state law in state court rather than under federal law in federal court. See *Romick* v. *Bekins Van & Storage Co.*, 197 F. 2d 369, 371 (CA5 1952).

This lawsuit concerns the area of antitrust in which federal laws have not displaced state law. See generally Mosk, State Antitrust Enforcement and Coordination with Federal Enforcement, 21 A. B. A. Antitrust Section 358, 361–368 (1962). Thus, respondent Brown had the option of proceeding under state or federal law, or both. So far as is apparent from the complaint, which was carefully limited to four California state-law causes of action, this case arises wholly without reference to federal law. Under settled principles of federal jurisdiction, therefore, respondent's lawsuit should not have been removed to federal court. See *Gully* v. *First National Bank in Meridian,* 299 U. S., at 113.

The Court today nonetheless sustains removal of this action on the ground that "at least some of the claims had a sufficient federal character to support removal." *Ante,* at 397, n. 2. I do not understand what the Court means by this. *Which* of the claims are federal in character? *Why* are the claims federal in character? In my view, they are all predicated solely on California law.[4] Certainly, none of them purports to state a claim under the federal antitrust laws, and the mere fact that plaintiffs might have chosen to proceed under the Clayton Act surely does not suffice to transmute their state claims into federal claims.

The Court relies on what it calls a "factual finding" by the District Court,[5] with which the Court of Appeals agreed, that "respondents had attempted to avoid removal jurisdiction by 'artful[ly]' casting their 'essentially federal law claims' as state-law claims." *Ibid.* But this amounts to no more than

[4] Indeed, the Court admits that the additional claims in *Brown II,* not included in *Brown I,* such as unfair competition, fraud, and restitution, are "state-law claims." *Ante,* at 402.

[5] The District Court did not consider this conclusion a "factual finding." It was included in a section of the District Court opinion devoted to legal analysis, not in the section entitled "Facts." Compare App. 187–190 with *id.,* at 190–192. In any event, a court's conclusion concerning the legal character of a complaint can hardly be considered a "factual finding."

a pejorative characterization of respondents' decision to proceed under state rather than federal law. "Artful" or not, respondents' complaints were not based on any claim of a federal right or immunity, and were not, therefore, removable.[6]

III

Even assuming that this Court and the lower federal courts have jurisdiction to decide this case, however, I dissent from the Court's disposition of the res judicata issue. Having reached out to assume jurisdiction, the Court inexplicably recoils from deciding the case. The Court finds it "unnecessary" to reach the question of the res judicata effect of *Brown I* on respondents' "*state*-law claims." *Ante*, at 402 (emphasis in original). "It is enough for our decision here," the Court says, "that *Brown I* is res judicata as to respondents' federal-law claims." *Ibid. But respondents raised only state-law claims; respondents did not raise any federal-law claims.*

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[6] The decisions cited by the Court in support of its approach, all from District Courts, are inapplicable. *In re Wiring Device Antitrust Litigation*, 498 F. Supp. 79 (EDNY 1980), and *Three J Farms, Inc.* v. *Alton Box Board Co.*, 1979–1 Trade Cases ¶ 62,423, p. 76,550 (SC 1978), rev'd on other grounds, 609 F. 2d 112 (CA4 1979), cert. denied, 445 U. S. 911 (1980), were cases in which the State itself had confined application of the state antitrust laws to purely intrastate commerce, thus leaving federal law the sole basis for suit. Similarly, *Prospect Dairy, Inc.* v. *Dellwood Dairy Co.*, 237 F. Supp. 176 (NDNY 1964), concerned a claim of an unfair labor practice, which is governed exclusively by federal law. See 29 U. S. C. § 187; *Teamsters* v. *Morton*, 377 U. S. 252 (1964).

Admittedly, some courts have not strictly observed the restrictions on removal jurisdiction. See, *e. g.*, *In re Carter*, 618 F. 2d 1093, 1101 (CA5 1980), cert. denied *sub nom. Sheet Metal Workers* v. *Carter*, 450 U. S. 949 (1981). 14 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3722, pp. 564–566 (1976), reports that "occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." (Footnote omitted.) Perusal of the cited decisions, however, reveals that most of them correctly confine this practice to areas of the law pre-empted by federal substantive law.

Thus, if the Court fails to decide the disposition of respondents' state-law claims, it decides nothing. And in doing so, the Court introduces the possibility—heretofore foreclosed by our decisions[7]—that unarticulated theories of recovery may survive an unconditional dismissal of the lawsuit.

Like JUSTICE BLACKMUN, I would hold that the dismissal of *Brown I* is res judicata not only as to every matter that was actually litigated, but also as to every ground or theory of recovery that might also have been presented. See *ante*, p. 402 (opinion concurring in judgment); 1B J. Moore & T. Currier, Moore's Federal Practice ¶ 0.410 [2], p. 1163 (1980). An unqualified dismissal on the merits of a substantial federal antitrust claim precludes relitigation of the same claim on a state-law theory. *Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F. 2d 1286, 1312–1315 (CA5 1971), cert. denied, 404 U. S. 1047 (1972); *Ford Motor Co.* v. *Superior Court*, 35 Cal. App. 3d 676, 680, 110 Cal. Rptr. 59, 61–62 (1973); see Restatement (Second) of Judgments § 61.1, Reporter's Note to Illustration 10, Comment *e*, pp. 178–179 (Tent. Draft No. 5, Mar. 10, 1978). The Court's failure to acknowledge this basic principle can only create doubts and confusion where none were before, and may encourage litigants to split their causes of action, state from federal, in the hope that they might win a second day in court.

I therefore respectfully dissent, and would vacate the judgment of the Court of Appeals with instructions to remand to the District Court with instructions to remand to state court.

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[7] See *Brown* v. *Felsen*, 442 U. S. 127, 131 (1979); *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 38 (1950); *Commissioner* v. *Sunnen*, 333 U. S. 591, 597 (1948); *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 378 (1940); *Cromwell* v. *County of Sac*, 94 U. S. 351, 352–353 (1877).

JONES, WARDEN, STONE MOUNTAIN CORRECTIONAL INSTITUTION *v.* HELMS

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-850. Argued April 28, 1981—Decided June 15, 1981

Under a Georgia statute, a parent who willfully and voluntarily abandons his or her dependent child is guilty of a misdemeanor, and those parents who commit that offense within Georgia and thereafter leave the State are guilty of a felony. Appellee pleaded guilty in a Georgia state court to the felony of abandoning his child and leaving the State, thereby formally admitting that he had willfully and voluntarily abandoned his child, leaving her in a dependent condition, before he left the State. Appellee received a prison sentence and, after exhausting state remedies, filed a petition for habeas corpus in Federal District Court. He claimed that the Georgia statute, by providing for enhanced punishment for parents who left Georgia after abandoning their children, violated the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of Art. IV, § 2, of the Constitution. The District Court denied relief, but the Court of Appeals reversed.

Held:

1. The Georgia statute does not impermissibly infringe upon the constitutionally protected right to travel. Appellee's guilty plea was an acknowledgment that he had committed a misdemeanor before he initially left Georgia, and his criminal conduct within Georgia necessarily qualified his right thereafter freely to travel interstate. Although a simple penalty for leaving a State is impermissible, if departure aggravates the consequences of conduct that is otherwise punishable, the State may treat the entire sequence of events, from the initial offense to departure from the State, as more serious than its separate components. Appellee has provided no basis for questioning the validity of the legislative judgment that the legitimate purpose of causing parents to support their children is served by making abandonment within the State followed by departure a more serious offense than mere abandonment within the State. Pp. 417–423.

2. Nor does the Georgia statute violate the Equal Protection Clause. The portion of the statute at issue applies equally to all parents residing in Georgia, and appellee has not shown that it has been arbitrarily or discriminatorily applied. It is not necessary to consider whether the State has available less restrictive means to serve the legitimate pur-

poses furthered by the felony provision of the statute. The statute does not infringe upon appellee's fundamental rights, and in this context the State need not employ the least restrictive, or even the most effective or wisest, means to achieve its legitimate ends. Similarly, it need not be determined whether the statute is unnecessarily broad on the ground that it does not require that the act of leaving the State—as well as the act of abandonment—be motivated by a wrongful intent. This is a matter relating to the wisdom of the legislation, and it raises no question with respect to the uniform and impartial character of the State's law. Pp. 423–426.

621 F. 2d 211, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 426. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 427.

Carol Atha Cosgrove, Assistant Attorney General of Georgia, argued the cause for appellant. With her on the briefs were *Arthur K. Bolton*, Attorney General, *Robert S. Stubbs II*, Executive Assistant Attorney General, *Don A. Langham*, First Assistant Attorney General, *John C. Walden* and *Michael J. Bowers*, Senior Assistant Attorneys General, and *Nicholas G. Dumich*, Assistant Attorney General.

James C. Bonner, Jr., argued the cause for the appellee. With him on the brief was *Robert D. Peckham*.

JUSTICE STEVENS delivered the opinion of the Court.

In Georgia, a parent who willfully and voluntarily abandons his or her dependent child is guilty of a misdemeanor. Those parents who commit that offense within Georgia and thereafter leave the State are guilty of a felony. The question presented by this appeal is whether this statutory classification violates the Equal Protection Clause of the Fourteenth Amendment.[1]

[1] The Fourteenth Amendment provides, in part:

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

As the case comes to us, the critical facts are not in dispute. In 1976, appellee pleaded guilty in Georgia to the felony of abandoning his child and leaving the State.[2] By that plea, appellee formally admitted that he had willfully and voluntarily abandoned his daughter, leaving her in a dependent condition, before he left the State of Georgia.[3] He received a 3-year prison sentence which he began to serve in 1978.[4]

[2] Appellee pleaded guilty to a charge that he had violated Ga. Code § 74–9902 (Supp. 1980), the statute at issue in this case. Section 74–9902 (a) provides, in part:

"If any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, he or she, as the case may be, shall be guilty of a misdemeanor: Provided, however, if any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, and shall leave this State, or if any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, after leaving this State, he or she, as the case may be, shall be guilty of a felony . . . ."

[3] Appellee previously had separated from his wife and had been ordered to pay to her $150 a month for the support of their minor daughter. It was stipulated that without making any such payments, appellee, "who by then had lost his property in Georgia, left the State and moved back to his native State, Alabama." App. 16. Appellee went to Alabama to pursue certain vocational training opportunities not available to him in Georgia. He did not make child support payments while in Alabama. Appellee remained in Alabama until February 1976 when, while visiting his daughter in Georgia, he was arrested for his continuous failure to pay child support. *Id.*, at 16–17. Shortly thereafter, appellee was formally charged by a Georgia grand jury with a felony violation of § 74–9902. App. 3–4.

[4] Initially, appellee received a 3-year suspended sentence conditioned upon his paying $200 per month as support for his child during her minority. *Id.*, at 8. He again left the State without making any such payments, first residing in Alabama and thereafter in Florida. In 1977, his estranged wife was murdered, and appellee gained custody of his daughter in Florida for a brief period of time. Ultimately, appellee moved back to Georgia, and was rearrested for his failure to pay child support. *Id.*, at 17–19. After a hearing, an order was entered enforcing his suspended sentence of imprisonment for a period of three years. *Id.*, at 10.

After exhausting his state remedies,[5] appellee filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia. He claimed that § 74–9902, by providing for enhanced punishment of those parents who left Georgia after abandoning their children, violated the Equal Protection Clause and the Privileges and Immunities Clause of Art. IV, § 2. See App. 22–23. The District Court denied relief, see *id.*, at 28–29, but the United States Court of Appeals for the Fifth Circuit reversed. See 621 F. 2d 211 (1980).[6]

The Court of Appeals held that the statute should be subjected to strict scrutiny because it infringed the fundamental right to travel.[7] Applying strict-scrutiny analysis, the court

[5] Appellee took no direct appeal from his initial felony conviction. However, in November 1978, after his suspended sentence had been revoked, he sought a writ of habeas corpus in the De Kalb Superior Court. Appellee claimed that the statute under which he had been convicted and sentenced violated both the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of Art. IV, § 2, of the United States Constitution because it authorized enhanced punishment based solely upon the exercise of the constitutional right to travel interstate and to reside outside the State of Georgia. After an evidentiary hearing, the state habeas court denied relief and ordered appellee remanded to custody. App. 11–15. The Supreme Court of Georgia denied appellee's application for a certificate of probable cause to appeal. *Id.*, at 20.

[6] During the pendency of his appeal from the District Court's order, appellee was released from custody. As the Court of Appeals noted, 621 F. 2d, at 212, n. 2, appellee's release did not moot his claim. See *Carafas* v. *LaVallee*, 391 U. S. 234, 237–240.

[7] The Court of Appeals analyzed the statutory classification, as follows: "The statute thus creates two classes of crimes, the first a misdemeanor for child abandonment within the State, the second a felony for leaving the State after abandonment or abandonment after leaving the State. Those outside Georgia, merely by their presence outside the State, are exposed to risk of a felony conviction while Georgia residents are exposed only to risk of a misdemeanor conviction for the same actions. We find the fundamental right to travel is infringed by this classification system." 621 F. 2d, at 212 (footnote omitted).

concluded that the state interests served by the statute, although legitimate, could be adequately protected by less drastic means; the statute therefore was invalid.[8] In the judgment of the Court of Appeals, the State's interest in extraditing offending parents, as well as its interest in requiring parents to support their children, was adequately served by the remedies provided in the Uniform Reciprocal Enforcement of Support Act (URESA), a version of which had been enacted in Georgia. See Ga. Code § 99–901a *et seq.* (1978 and Supp. 1980).[9] Moreover, because the Court of Appeals understood the statute not to require any proof of criminal intent, it considered this feature a further indication of the statute's unconstitutional overbreadth.[10]

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[8] The Court of Appeals concluded that the statutory discrimination was not justified by a compelling state interest:

"We therefore find no sufficiently compelling state interest here which permits distinguishing between nonsupporting parents within or without the State of Georgia. There is no question that the statute violates equal protection. Further, even where a governmental purpose is legitimate, as here, the 'purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" *Id.*, at 213 (footnote omitted).

[9] According to the Court of Appeals, the URESA adequately served the state interests § 74–9902 was designed to further:

"Georgia argues that the compelling state interests here are (1) the greater ease in extraditing persons accused of felonies than those accused of misdemeanors and (2) the protection of the State's fiscal integrity by the resulting enforcement of required parental child support. These arguments are unpersuasive since Georgia has in place, through its adoption of the Uniform Reciprocal Enforcement of Support Act (URESA), Ga. Code Ann. § 99–9A, et seq., an alternative means of enforcing child support obligations. Fiscal integrity of the State, support of minor children, and extradition of the nonpaying parent are all protected by this Act." 621 F. 2d, at 212–213 (footnotes omitted).

[10] As the Court of Appeals read § 74–9902, a felony conviction could be secured without any showing by the State that the abandoning parent had acted with criminal intent:

"The failure of the statute to require criminal intent as an element necessary for conviction is further indication of its overbreadth. Under

The Warden appealed, and we noted probable jurisdiction. 449 U. S. 1122. In an opinion issued several months prior to the Court of Appeals' decision, the Georgia Supreme Court had upheld the felony provision of § 74–9902 against an almost identical constitutional challenge. See *Garren* v. *State*, 245 Ga. 323, 264 S. E. 2d 876 (1980). We now resolve this conflict between the Georgia Supreme Court and the Court of Appeals by reversing the judgment of the Court of Appeals.

I

The Court of Appeals' conclusion that § 74–9902 is constitutionally invalid rests entirely on the premise that the statute impairs the fundamental right of every Georgia resident to travel from Georgia to another State.[11] It is, of

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the provision a person leaving the State fully intending to support his or her children, but unable to do so, commits a felony. A series of noncriminal acts can thus become a crime under the statute, subjecting the nonresident to extradition and felony conviction." 621 F. 2d, at 213 (footnote omitted).

Although the Court of Appeals' understanding of the statute was correct insofar as its comments concerned the mental state of the parent at the time of his or her departure from the State, the court appears to have overlooked the statutory requirement that the offending parent have "wilfully and voluntarily" abandoned his or her child. See n. 2, *supra*. As appellant points out, under Georgia law both desertion—*i. e.*, the willful forsaking and desertion of the duties of parenthood—and dependency—*i. e.*, leaving the child without necessaries—are elements of the offense of child abandonment under § 74–9902. See *Waites* v. *State*, 138 Ga. App. 513, 514, 226 S. E. 2d 621, 622 (1976). Because the State must establish that the desertion was willful, the Court of Appeals erred in suggesting that "[a] series of noncriminal acts can thus become a crime under the statute."

[11] It should be noted that this case involves only an abandonment by a resident parent within the State of Georgia, followed by the abandoning parent's departure from the State. Section 74–9902 also purports to define as a felony an abandonment by a parent who is not a resident of Georgia. See n. 2, *supra*. Although the Court of Appeals appears to have considered this aspect of the statute of some significance, see 621

course, well settled that the right of a United States citizen to travel from one State to another and to take up residence in the State of his choice is protected by the Federal Constitution. Although the textual source of this right has been the subject of debate, its fundamental nature has consistently been recognized by this Court. See *Shapiro* v. *Thompson*, 394 U. S. 618, 629–631; *United States* v. *Guest*, 383 U. S. 745, 757–759. The right to travel has been described as a privilege of national citizenship,[12] and as an aspect of liberty that is protected by the Due Process Clauses of the Fifth

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F. 2d, at 212, and appellee emphasizes it in his argument here, we express no opinion on the validity of such an application of § 74–9902. See *In re King*, 3 Cal. 3d 226, 474 P. 2d 983 (1970).

[12] In *Edwards* v. *California*, 314 U. S. 160, the Court held that the Commerce Clause required the invalidation of state statutes designed to restrict interstate migration. Justice Douglas, joined by Justice Black and Justice Murphy, agreed with the Court's judgment, but preferred to rely upon the Privileges and Immunities Clause of the Fourteenth Amendment as the source of the right to travel:

"The right to move freely from State to State is an incident of *national* citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference. Mr. Justice Moody in *Twining* v. *New Jersey*, 211 U. S. 78, 97, stated, 'Privileges and immunities of citizens of the United States . . . are only such as arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States.' And he went on to state that one of those rights of *national* citizenship was 'the right to pass freely from State to State.' *Id.*, at 97." *Id.*, at 178 (Douglas, J., concurring) (emphasis and ellipsis in original).

Justice Jackson was of essentially the same view. See *id.*, at 182–184 (concurring opinion).

It also should be noted that earlier decisions, beginning with *Corfield* v. *Coryell*, 6 F. Cas. 546 (No. 3,230) (CCED Pa. 1825) (Washington, J., Circuit Justice), suggested that the right to travel was a privilege and immunity of national citizenship protected by the Privileges and Immunities Clause of Art. IV. See *United States* v. *Guest*, 383 U. S. 745, 764–767 (opinion of Harlan, J.). In fact, appellee relied upon Art. IV in both his state and federal habeas corpus petitions. See n. 5, *supra*; *supra*, at 415.

and Fourteenth Amendments.[13] Whatever its source, a State may neither tax nor penalize a citizen for exercising his right to leave one State and enter another.

Despite the fundamental nature of this right, there nonetheless are situations in which a State may prevent a citizen from leaving. Most obvious is the case in which a person has been convicted of a crime within a State. He may be detained within that State, and returned to it if he is found in another State. Indeed, even before trial or conviction, probable cause may justify an arrest and subsequent temporary detention. Similarly, a person who commits a crime in a State and leaves the State before arrest or conviction may be extradited following "a summary and mandatory executive proceeding."[14] Manifestly, a person who has committed an offense against the laws of Georgia may be stopped at its borders and temporarily deprived of his freedom to travel elsewhere within or without the State.[15]

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[13] At the beginning of this century, Chief Justice Fuller, in dictum, identified the Fourteenth Amendment as a source of the right to travel:

"Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution." *Williams* v. *Fears*, 179 U. S. 270, 274.

In his dissenting opinion in *Shapiro* v. *Thompson*, 394 U. S. 618, 671, Justice Harlan concluded that "the right to travel interstate is a 'fundamental' right which, for present purposes, should be regarded as having its source in the Due Process Clause of the Fifth Amendment." See also *United States* v. *Guest*, 383 U. S., at 757–759; *id.*, at 769–770 (opinion of Harlan, J.).

[14] *Michigan* v. *Doran*, 439 U. S. 282, 288.

[15] In his concurring opinion in *Edwards* v. *California*, *supra*, Justice Jackson explained this limitation on the right to travel:

"The right of the citizen to migrate from state to state which, I agree with Mr. Justice Douglas, is shown by our precedents to be one of national citizenship, is not, however, an unlimited one. In addition to being sub-

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In this case, appellee's guilty plea was an acknowledgment that he had committed a misdemeanor before he initially left Georgia for Alabama. Upon conviction of that misdemeanor, he was subject to imprisonment for a period of up to one year.[16] Therefore, although he was not convicted of abandonment until after his first trip to Alabama, appellee's own misconduct had qualified his right to travel interstate before he sought to exercise that right. We are aware of nothing in our prior cases or in the language of the Federal Constitution that suggests that a person who has committed an offense punishable by imprisonment has an unqualified federal right to leave the jurisdiction prior to arrest or conviction.

This case differs in a significant respect from prior cases involving the validity of state enactments that were said to penalize the exercise of the constitutional right to travel. In the first decision squarely to recognize the right to travel, *Crandall* v. *Nevada*, 6 Wall. 35, the Court held that a State may not impose a tax on residents who desire to leave the State, nor on nonresidents merely passing through. In *Edwards* v. *California*, 314 U. S. 160, the Court held that a State may not make it a crime to bring a nonresident indigent person into the State. In more recent decisions, the Court has examined state statutes imposing durational residence requirements that deprived new residents of rights or benefits available to old residents, to determine whether such requirements penalized citizens for exercising their constitutional

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ject to all constitutional limitations imposed by the federal government, such citizen is subject to some control by state governments. He may not, if a fugitive from justice, claim freedom to migrate unmolested, nor may he endanger others by carrying contagion about. These causes, and perhaps others that do not occur to me now, warrant any public authority in stopping a man where it finds him and arresting his progress across a state line quite as much as from place to place within the state." 314 U. S., at 184.

[16] See Ga. Code § 27-2506 (1978).

right to travel.[17] In all of those cases, the statute at issue imposed a burden on the exercise of the right to travel by citizens whose right to travel had not been qualified in any way. In contrast, in this case, appellee's criminal conduct within the State of Georgia necessarily qualified his right thereafter freely to travel interstate. Appellee's claim is therefore on a different footing from the claims at issue in *Crandall, Edwards,* and the durational residence requirement cases.[18]

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[17] In *Dunn* v. *Blumstein,* 405 U. S. 330, 334, we explained the problem presented by durational residence requirements:

"Durational residence laws penalize those persons who have traveled from one place to another to establish a new residence during the qualifying period. Such laws divide residents into two classes, old residents and new residents, and discriminate against the latter . . . ."

We have invalidated durational residence requirements that operated to deprive new residents of the right to vote, *Dunn, supra,* and of welfare and medical care benefits. See *Shapiro* v. *Thompson, supra; Memorial Hospital* v. *Maricopa County,* 415 U. S. 250. However, even though durational residence requirements necessarily impinge to some extent on the right to travel, they are not automatically invalid. *Memorial Hospital, supra,* at 256. See, *e. g., Sosna* v. *Iowa,* 419 U. S. 393; cf. *Vlandis* v. *Kline,* 412 U. S. 441, 452–453.

[18] In its decision sustaining the validity of § 74-9902, the Georgia Supreme Court recognized this distinction:

"There is an entirely obvious difference, on the one hand, between an attempt by a 'receiving state' to preclude or discourage inward migration from 'sending states' of persons deemed by the 'receiving state' to be 'undesirables,' 'non-contributors' or 'economically burdensome persons,' and efforts, as in the present case, by a 'sending state' to bring persons accused of crimes back from 'receiving states' to face criminal trial and punishment in the 'sending state.' Persons, including indigents and other migrants, have a right of free travel. . . . On the other hand, persons charged with the commission of crimes shall be delivered up to the state having jurisdiction of the crime. . . . A person charged in Georgia with commission of a crime who has left Georgia and entered another state cannot be said to have a constitutionally protected right of free travel in interstate commerce that can be asserted to bar prosecution for

These precedents are inapposite for another reason as well. The question presented by this case is not whether Georgia can justify disparate treatment of residents and nonresidents,[19] or of new and old residents.[20] Rather, the question is whether the State may enhance the misdemeanor of child abandonment to a felony if a resident offender leaves the State after committing the offense. Presumably the commission of the misdemeanor of child abandonment would not justify a permanent restriction on the offender's freedom to leave the jurisdiction. But a restriction that is rationally related to the offense itself—either to the procedure for ascertaining guilt or innocence, or to the imposition of a proper punishment or remedy—must be within the State's power. Thus, although a simple penalty for leaving a State is plainly impermissible,[21] if departure aggravates the consequences of conduct that is otherwise punishable, the State may treat the

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the Georgia offense." *Garren* v. *State*, 245 Ga. 323, 324–325, 264 S. E. 2d 876, 877–878 (1980) (citations omitted).

The California Supreme Court recognized the same distinction in an opinion upholding a statute that tolled the statute of limitations for criminal offenses during the time the defendant was outside the State: "[T]here is clearly a distinction between one who, like defendant, leaves the state after committing a crime, resulting in the tolling of the statute of limitations during his absence, and one who has committed no crime but is deprived of a government benefit merely because he exercises his right to travel to another state. In the former circumstance, the state has an interest in assuring that the defendant is available locally not only to enhance the possibility of detection but also to avoid the burdens of extradition proceedings, should he be charged, his whereabouts become known, and he refuses to return voluntarily." *Scherling* v. *Superior Court of Santa Clara County*, 22 Cal. 3d 493, 501, 585 P. 2d 219, 223–224 (1978).

[19] See n. 11, *supra*.

[20] The latter variety of disparate treatment was primarily at issue in cases such as *Shapiro* v. *Thompson*, *Dunn* v. *Blumstein*, and *Memorial Hospital* v. *Maricopa County*, *supra*.

[21] Cf. *Crandall* v. *Nevada*, 6 Wall. 35; *Edwards* v. *California*, 314 U. S. 160.

entire sequence of events, from the initial offense to departure from the State, as more serious than its separate components.

The Georgia Supreme Court has held that § 74–9902's enhancement provision serves the "legislative purpose of causing parents to support their children since the General Assembly could have concluded that the parental support obligation is more difficult to enforce if the parent charged with child abandonment leaves the state." *Garren* v. *State*, 245 Ga., at 325, 264 S. E. 2d, at 878. There can be no question about the legitimacy of the purpose to cause parents to support their children.[22] And appellee has not provided us with any basis for questioning the validity of the legislative judgment that this purpose is served by making abandonment within the State followed by departure a more serious offense than mere abandonment within the State. We therefore are unwilling to accept the suggestion that this enhancement is an impermissible infringement of appellee's constitutional right to travel. Accordingly, we reject the premise on which the Court of Appeals' holding rests.

II

Having rejected the claim that the Georgia statute impermissibly infringes on the constitutionally protected right to travel, we find no support for the conclusion that the statute violates the Equal Protection Clause. That Clause "announces a fundamental principle: the State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle." *New York City Transit Authority* v. *Beazer*, 440 U. S. 568, 587.

The Equal Protection Clause provides a basis for challenging legislative classifications that treat one group of persons

[22] Indeed, the Court of Appeals and appellee both acknowledged the legitimacy of the statute's purposes. See 621 F. 2d, at 213; Brief for Appellee 13–15.

as inferior or superior to others,[23] and for contending that general rules are being applied in an arbitrary or discriminatory way.[24] The portion of the Georgia statute at issue in this case applies equally to all parents residing in Georgia; nothing in appellee's argument or in the record suggests that the statute has been enforced against appellee any differently than it would be enforced against anyone else who engaged in the same conduct. By its terms, it does not subject "one caste of persons to a code not applicable to another," see n. 23, *supra*, nor has appellee shown that it has been arbitrarily or discriminatorily applied. Thus, neither on the face of § 74–9902, nor in its application to appellee, can we detect any violation of the constitutional requirement that the State's administration of its laws must be impartial and evenhanded. *New York City Transit Authority, supra.*

The characterization by the Court of Appeals and appellee of the Georgia statute as "overbroad" does not affect our conclusion. Appellee contends, and the Court of Appeals found, that Georgia has available less restrictive means to serve the legitimate purposes furthered by the felony provi-

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[23] An effective expression of this point was made in the Senate debate preceding the adoption of the Fourteenth Amendment. Senator Howard stated:

"This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another.

. . . . .

It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just Government." Cong. Globe, 39th Cong., 1st Sess., 2766 (1866).

Most frequently, claims of denial of equal protection of the laws are asserted by the members of a class of persons easily defined by a characteristic such as race, sex, alienage, illegitimacy, or religion.

[24] See, *e. g., Yick Wo* v. *Hopkins*, 118 U. S. 356.

sion of § 74–9902. In particular, our attention is directed to the URESA, which is said to protect the State's interests in fiscal integrity, support of minor children, and extradition of abandoning parents.[25] The appellant argues at length that the URESA does not provide an adequate means of enforcing the support obligations of parents who abandon their children and leave the jurisdiction. Although, the appellant's argument is persuasive,[26] for purposes of deciding this case we need neither accept nor reject it. The Court of Appeals deemed the remedies available under the URESA significant because a legislative program that infringes upon fundamental rights in order to serve legitimate state ends must be the least restrictive means for achieving those ends.[27] However, because we have concluded that § 74–9902 does not infringe upon appellee's fundamental rights, this reasoning is inapplicable. In the context of this case, the State need not em-

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[25] See n. 9, *supra*. Appellee also suggests that making all child abandonments felonies would serve Georgia's legitimate interests in a "less restrictive" fashion than § 74–9902. It is true that such a change would preclude appellee's claim that the statute is discriminatory, but it is not clear that such a statute would be less restrictive.

[26] A number of commentators have identified the same weaknesses in the enforcement mechanism established in the URESA as the appellant cites in his argument in this case. See, *e. g.*, Note, Interstate Enforcement of Support Obligations Through Long Arm Statutes and URESA, 18 J. Fam. Law 537, 541 (1980); Comment, Enforcement of Support Obligations: A Solution and Continuing Problems, 61 Ky. L. J. 322, 328–329 (1972). Cf. Chambers, Men Who Know They Are Watched: Some Benefits and Costs of Jailing for Nonpayment of Support, 75 Mich. L. Rev. 900 (1977).

[27] The Court of Appeals relied upon *Shelton* v. *Tucker*, 364 U. S. 479, for this proposition:

"[E]ven though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.*, at 488 (footnotes omitted).

ploy the least restrictive, or even the most effective or wisest, means to achieve its legitimate ends.

Similarly, we need neither agree nor disagree with appellee's argument that the statute is unnecessarily severe because it does not require that the act of leaving the State—as well as the act of abandonment—be motivated by a wrongful intent.[28] Because of this feature, the statute may well be unnecessarily broad. This is a matter, however, that relates to the wisdom of the legislation. It raises no question with respect to the uniform and impartial character of the State's law. It therefore does not implicate the fundamental principle embodied in the Equal Protection Clause of the Fourteenth Amendment.

Because we conclude that § 74–9902 did not penalize the exercise of the constitutional right to travel and did not deny appellee the equal protection of the laws, the judgment of the Court of Appeals is reversed.

So ordered.

JUSTICE WHITE, concurring.

In *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), the Court held that restricting welfare benefits to those who had resided in a State for at least one year penalized the exercise of the constitutional right to travel from State to State and that because it did so, the discrimination against newly arrived residents had to be justified by a compelling state interest to avoid violating the Equal Protection Clause. Such an interest was not found. It seemed to me at the time, and it seems to me now, that the same result would have obtained in that case without implicating the Equal Protection Clause at all, given the Court's view of the relationship between the restriction on travel and the State's justifying interests. As

[28] The Court of Appeals considered the statute's failure to require that the act of leaving the State be accompanied by criminal intent a significant defect. See *supra*, at 416, and n. 10.

JUSTICE STEWART said in concurrence, any purpose "offered in support of a law that so clearly impinges upon the constitutional right of interstate travel must be shown to reflect a *compelling* governmental interest." *Id.*, at 643–644. In reaching its conclusion, the Court could as well have said that the proffered state interests did not justify the deterrent effect on the right to travel. Had it found those interests sufficient to warrant the residency requirement, however, the equal protection argument would also have been without force because the reason for insisting upon more than a rational basis for the requirement would have disappeared.

As I understand it, this is essentially the approach followed by the Court today: it first finds that whatever restriction on interstate travel is imposed by the challenged Georgia provision, the State's interest in enforcing its child support laws is sufficient to justify the restriction. The opinion then finds that the equal protection claim is without substance because there is at least a rational basis for the State's classification.

I join the Court's opinion and judgment.

JUSTICE BLACKMUN, concurring in the judgment.

No one disputes that the State of Georgia can designate the crime of willful child abandonment a felony. It instead has chosen to make the crime a misdemeanor if confined within state boundaries, but a felony once abandonment is accompanied by departure from the State. Thus, in effect, the State requires an abandoning and nonsupporting parent to remain in Georgia if he or she wishes to avoid more serious criminal penalties. This burden on interstate travel applies even if the parent has no criminal intent when crossing the state line.

Given the Georgia statutory scheme, § 74–9902 (a) clearly penalizes appellee's exercise of his constitutional right to travel. In my view, however, that penalty is justified by the State's special interest in law enforcement in this context. The challenged criminal statute is concerned primarily with

restitution rather than punishment, and the core criminal conduct, willful abandonment and continuing nonsupport, is markedly more difficult to redress once the offending parent leaves the jurisdiction. A restriction that reasonably discourages departure may therefore be justified as tailored to further the precise remedial objective of the criminal law. Significantly, however, the objective advanced here is not identical to the more general goal of improving the administration of criminal justice. The Court perhaps has this distinction in mind when it concludes, *ante*, at 422, that where departure "aggravates the consequences of conduct that is otherwise punishable," it may merit enhanced punishment. I doubt that a State constitutionally may impose greater penalties for all crimes simply because the accused leaves the jurisdiction. To hold otherwise ignores the availability of summary interstate transfer procedures under the Extradition Clause, and chills unacceptably the travel rights of the presumptively innocent citizen.

For me, it also is noteworthy that appellee pleaded guilty to the crime of willful abandonment and subsequent departure from the State. The record gives no indication that appellee was anything but aware that his crime would become more serious once he left Georgia. Thus, the Court today need not decide the constitutionality of this statute as applied to a person of ordinary intelligence who had no knowledge, or reason to know, that the protected act of interstate travel would convert him from a misdemeanant into a felon. Cf. *Lambert* v. *California*, 355 U. S. 225 (1957).

I concur in the judgment.

UNITED STATES *v.* MAINE ET AL. (MASSACHUSETTS BOUNDARY CASE)

ON JOINT MOTION FOR ENTRY OF SUPPLEMENTAL DECREE

No. 35, Orig. Decided March 17, 1975—Decree entered October 6, 1975—Supplemental decree entered June 15, 1981

Supplemental decree entered.

Opinion reported: 420 U. S. 515; decree reported: 423 U. S. 1.

The Report of the Special Master is received and ordered filed.

SUPPLEMENTAL DECREE

The Court's Special Master having filed a Report recommending the entry of a supplemental decree for the purpose of defining with greater particularity the boundary line between the submerged lands of the United States and the submerged lands of the Commonwealth of Massachusetts, as contemplated by the Court's Decree of October 6, 1975, 423 U. S. 1, and the Court's Order of June 29, 1977, 433 U. S. 917, appointing the Honorable Walter E. Hoffman as Special Master in this cause, and the United States and the Commonwealth of Massachusetts having stated their acquiescence in the recommendations of the said Report:

IT IS ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The coastline of the Commonwealth of Massachusetts, as that term is used in the Court's Decree herein dated October 6, 1975, shall be, in the area hereafter specified:

(a) A straight line running southwesterly from a point on the mean low water line at Eastern Point on Cape Ann (approximately 42°34′45″ N, 70°39′43″ W on NOS Chart 13267, 18th Ed.) to a point on the mean low water line seaward of Strawberry Point (approximately 42°15′31″ N, 70°46′05″ W on the same NOS Chart), thence southeasterly along the line of ordinary mean low water (including closing lines across

Scituate Harbor and the North River) to Brant Rock (approximately 42°05′29″ N, 70°38′15″ W on the same NOS Chart), thence a straight line running easterly to a point on the mean low water line at Race Point on Cape Cod (approximately 42°03′46″ N, 70°14′51″ W on the same NOS Chart);

(b) A straight line running southeasterly from a point on the mean low water line at Gooseberry Neck (approximately 41°28′43″ N, 71°02′05″ W on NOS Chart 13218, 21st Ed.) to a point on the mean low water line on the southwestern extremity of Cuttyhunk Island (approximately 41°24′44″ N, 70°57′07″ W on the same NOS Chart).

2. The reference to the Special Master appointed by the Court on June 29, 1977, is continued in effect, under the terms of the Court's Order of that date, and he is directed to proceed with the cause, holding such further proceedings as may seem advisable until all remaining issues referred to him are ready for submission to the Court by his further report.

3. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to this decree or to effectuate the rights of the parties in the premises.

JUSTICE MARSHALL took no part in the consideration or decision of this matter.

CALIFORNIA *v.* ARIZONA ET AL.

ON JOINT MOTION FOR ENTRY OF A DECREE

No. 78, Orig. Leave to file complaint granted February 22, 1979—Decree entered June 15, 1981

Decree entered.

Opinion reported: 440 U. S. 59.

The Report of the Special Master is received and ordered filed.

DECREE

The joint motion of plaintiff and defendants for entry of a decree having been submitted to the Court together with the Report of the Special Master recommending that the motion be granted,

IT IS ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The Report of the Special Master is hereby approved, and the motion of plaintiff and defendants for entry of a decree is granted.

2. This decree determines ownership of certain portions of the bed of the former channel of the Colorado River. The decree does not relate to, nor does it have an effect upon, the political boundary between the State of California and the State of Arizona, which was set by congressionally approved compact in 1966 (Pub. L. No. 89–531, 80 Stat. 340).

3. The State of California is the owner in fee simple, by virtue of its sovereignty, of those lands in the bed of the former channel of the Colorado River more particularly described in Exhibit A to this decree.

4. The boundaries of the lands described in paragraph 3 above and in Exhibit A to this decree are permanent and fixed.

5. The State of Arizona and the United States of America, and each of them, have no right, title, estate, or lien, what-

ever, in the lands described in paragraph 3 above and in Exhibit A to this decree, and the State of Arizona and the United States of America, and each of them, are hereby enjoined and restrained from claiming or asserting any right, title, estate, or lien, whatever, in said lands, subject to the provisions of paragraph 9 below.

6. The State of Arizona is the owner in fee simple, by virtue of its sovereignty, of those lands in the bed of the former channel of the Colorado River more particularly described in Exhibit B to this decree.

7. The boundaries of the lands described in paragraph 6 above and in Exhibit B to this decree are permanent and fixed.

8. The State of California and the United States of America, and each of them, have no right, title, estate, or lien, whatever, in the lands described in paragraph 6 above and in Exhibit B to this decree, and the State of California and the United States of America, and each of them, are hereby enjoined and restrained from claiming or asserting any right, title, estate, or lien, whatever, in said lands, subject to the provisions of paragraph 9 below.

9. This action does not present for decision any question concerning the existence or extent of the federal navigational servitude in the lands that are the subject of this decree, and this decree makes no determination concerning that question.

10. The expenses of the Special Master shall be borne by the parties as previously directed by the Court. Each party shall bear its own costs in this action.

EXHIBIT A

A parcel of land in the former channel of the Colorado River in Imperial County, California, adjacent to Township 9 South, Range 21 East, San Bernardino Meridian; Township 10 South Range 21 East, San Bernardino Meridian; Township 10 South, Range 22 East, San Bernardino Meri-

dian; Township 11 South, Range 22 East, San Bernardino Meridian, more particularly described as follows:

BEGINNING at a point on the center line of the former channel of the Colorado River having California Coordinate System, Zone 6, coordinates of x=2,482,449.14 feet and y=387,218.39 feet, from which United States Water and Power Resources Service (formerly United States Bureau of Reclamation) Station RUIN bears N 56°27′07″ E 733.37 feet, as said points are shown on the map entitled, "Davis Lake Area Project Administrative Maps," said map approved October 28, 1976 by the California State Lands Commission, and being on file at the office of said Commission in Sacramento, California; thence from said point of beginning, upstream along the center line of the former channel of the Colorado River, said center line being a fixed and limiting boundary of the herein described parcel, the following 377 courses:

1. N 06°11′02″ E 91.76 feet;
2. N 54°12′32″ E 18.78 feet;
3. N 12°45′10″ E 174.75 feet;
4. N 12°53′00″ W 103.53 feet;
5. N 05°09′17″ W 146.10 feet;
6. N 13°58′10″ E 87.64 feet;
7. N 05°10′13″ W 66.53 feet;
8. N 23°31′10″ E 26.95 feet;
9. N 36°32′17″ E 111.82 feet;
10. N 19°17′18″ W 275.69 feet;
11. N 04°49′28″ W 45.39 feet;
12. N 25°30′26″ W 64.01 feet;
13. N 21°45′19″ W 170.09 feet;
14. N 02°16′16″ E 15.76 feet;
15. N 26°25′14″ W 142.77 feet;
16. N 19°59′28″ W 151.68 feet;
17. N 32°00′03″ W 345.18 feet;
18. N 03°24′14″ W 16.15 feet;
19. N 34°25′41″ W 352.66 feet;
20. N 30°34′31″ W 260.03 feet;
21. N 36°46′58″ W 310.64 feet;
22. N 41°48′53″ W 306.12 feet;
23. N 40°25′19″ W 290.08 feet;
24. N 44°30′49″ W 169.94 feet;
25. N 30°52′29″ W 39.42 feet;
26. N 47°44′12″ W 40.80 feet;
27. N 21°30′40″ W 23.17 feet;
28. N 34°34′58″ W 209.82 feet;
29. N 34°44′50″ W 317.95 feet;
30. N 34°44′47″ W 291.32 feet;
31. N 37°31′17″ W 279.41 feet;
32. N 36°05′21″ W 275.56 feet;
33. N 37°39′47″ W 240.96 feet;
34. N 32°03′44″ W 164.74 feet;
35. N 26°41′11″ E 14.17 feet;
36. N 37°08′14″ W 33.36 feet;
37. N 35°36′16″ W 86.74 feet;
38. N 39°41′49″ W 66.46 feet;
39. N 37°12′59″ W 163.13 feet;
40. N 28°19′51″ W 220.22 feet;
41. N 34°33′42″ W 149.82 feet;
42. N 39°16′54″ W 17.91 feet;
43. N 46°59′54″ W 65.69 feet;
44. N 36°45′41″ W 175.14 feet;

45. N 30°48′13″ W 247.89 feet;
46. N 35°33′18″ W 233.54 feet;
47. N 42°45′30″ W 301.59 feet;
48. N 29°31′50″ W 70.64 feet;
49. N 39°15′12″ W 181.84 feet;
50. N 34°08′26″ W 287.28 feet;
51. N 36°56′15″ W 341.54 feet;
52. N 33°51′40″ W 248.93 feet;
53. N 30°53′53″ W 227.36 feet;
54. N 28°52′32″ W 133.47 feet;
55. N 41°33′10″ W 32.08 feet;
56. N 32°30′33″ W 214.79 feet;
57. N 32°47′41″ W 159.63 feet;
58. N 41°44′15″ W 149.07 feet;
59. N 51°38′10″ W 15.67 feet;
60. N 29°44′55″ W 238.30 feet;
61. N 25°49′43″ W 111.43 feet;
62. N 09°13′34″ W 69.07 feet;
63. N 21°53′52″ W 147.48 feet;
64. N 65°05′19″ W 9.15 feet;
65. N 32°30′38″ W 38.27 feet;
66. N 21°01′27″ W 83.19 feet;
67. N 10°39′51″ E 44.53 feet;
68. N 02°15′38″ W 45.67 feet;
69. N 44°22′08″ W 27.00 feet;
70. N 20°34′25″ W 93.00 feet;
71. N 18°23′16″ W 48.78 feet;
72. N 16°26′02″ W 95.55 feet;
73. N 04°26′34″ W 49.11 feet;
74. N 08°54′12″ W 109.59 feet;
75. N 45°00′45″ W 15.45 feet;
76. N 15°52′18″ W 46.11 feet;
77. N 23°50′06″ E 50.55 feet;
78. N 06°27′18″ W 28.68 feet;
79. N 29°30′20″ W 14.62 feet;
80. N 15°29′04″ E 39.92 feet;
81. N 28°23′27″ E 42.72 feet;
82. N 23°04′47″ E 132.80 feet;
83. N 47°17′33″ E 256.64 feet;
84. N 48°40′23″ E 89.15 feet;
85. N 52°50′14″ E 286.63 feet;
86. N 59°57′29″ E 156.23 feet;
87. N 62°51′03″ E 103.67 feet;
88. N 60°52′13″ E 166.51 feet;
89. N 57°00′27″ E 53.17 feet;
90. N 57°43′27″ E 326.93 feet;
91. N 68°38′25″ E 38.74 feet;
92. N 45°44′50″ E 25.05 feet;
93. N 60°53′25″ E 148.11 feet;
94. N 52°28′50″ E 136.72 feet;
95. N 53°48′33″ E 194.46 feet;
96. N 53°11′16″ E 49.55 feet;
97. N 80°15′07″ E 22.12 feet;
98. N 50°13′23″ E 181.66 feet;
99. N 69°57′50″ E 40.08 feet;
100. N 34°56′12″ E 24.41 feet;
101. N 50°47′14″ E 202.15 feet;
102. N 61°59′40″ E 50.34 feet;
103. N 47°49′50″ E 49.76 feet;
104. N 48°09′42″ E 163.97 feet;
105. N 50°09′37″ E 112.15 feet;
106. N 27°22′23″ E 134.94 feet;
107. N 47°51′44″ E 124.47 feet;
108. N 46°01′44″ E 142.53 feet;
109. N 39°04′50″ E 180.94 feet;
110. N 45°09′21″ E 189.68 feet;
111. N 39°57′52″ E 156.08 feet;
112. N 43°26′27″ E 199.19 feet;
113. N 52°12′27″ E 221.41 feet;
114. N 50°29′55″ E 152.42 feet;
115. N 52°54′27″ E 179.48 feet;
116. N 62°15′35″ E 213.37 feet;
117. N 68°45′32″ E 55.26 feet;
118. N 67°29′40″ E 76.60 feet;
119. N 65°41′07″ E 165.43 feet;
120. N 67°14′09″ E 294.39 feet;
121. N 64°24′36″ E 128.78 feet;
122. N 53°03′32″ E 106.15 feet;
123. N 70°17′39″ E 35.29 feet;
124. N 73°29′13″ E 147.47 feet;
125. N 59°19′13″ E 74.01 feet;
126. N 30°28′52″ E 18.53 feet;
127. N 60°22′22″ E 71.20 feet;
128. N 18°45′56″ E 28.50 feet;
129. N 39°20′12″ E 181.32 feet;
130. N 15°18′44″ E 22.87 feet;

131. N 34°48′05″ E 113.34 feet;
132. N 01°37′33″ E 25.20 feet;
133. N 20°03′20″ E 279.59 feet;
134. N 08°48′55″ E 494.65 feet;
135. N 06°07′16″ W 329.64 feet;
136. N 01°08′01″ W 46.25 feet;
137. N 12°04′58″ W 216.22 feet;
138. N 02°16′55″ E 41.56 feet;
139. N 12°25′25″ W 199.17 feet;
140. N 27°14′52″ W 38.46 feet;
141. N 20°48′06″ W 242.26 feet;
142. N 19°51′45″ W 337.38 feet;
143. N 24°07′19″ W 226.77 feet;
144. N 27°31′47″ W 169.08 feet;
145. N 25°20′37″ W 190.07 feet;
146. N 27°40′18″ W 329.72 feet;
147. N 28°56′10″ W 330.72 feet;
148. N 24°33′34″ W 60.51 feet;
149. N 29°27′35″ W 208.29 feet;
150. N 28°05′26″ W 247.46 feet;
151. N 23°44′10″ W 163.83 feet;
152. N 13°09′48″ W 254.49 feet;
153. N 19°22′18″ W 307.39 feet;
154. N 21°47′25″ W 159.63 feet;
155. N 30°33′33″ W 99.94 feet;
156. N 29°12′13″ W 207.55 feet;
157. N 31°55′33″ W 235.86 feet;
158. N 28°51′47″ W 106.13 feet;
159. N 36°40′00″ W 174.32 feet;
160. N 02°47′21″ E 19.11 feet;
161. N 43°43′57″ W 240.40 feet;
162. N 41°01′16″ W 304.70 feet;
163. N 46°54′46″ W 122.65 feet;
164. N 40°49′49″ W 90.29 feet;
165. N 51°59′40″ W 174.20 feet;
166. N 44°21′26″ W 78.79 feet;
167. N 54°41′29″ W 220.08 feet;
168. N 53°16′11″ W 329.75 feet;
169. N 61°51′41″ W 110.58 feet;
170. N 52°54′43″ W 215.67 feet;
171. N 58°08′36″ W 153.28 feet;
172. N 59°29′55″ W 174.49 feet;
173. N 56°21′47″ W 191.68 feet;
174. S 89°23′45″ W 20.87 feet;
175. N 62°40′51″ W 144.58 feet;
176. N 60°27′35″ W 329.61 feet;
177. N 58°43′43″ W 350.72 feet;
178. N 49°48′54″ W 206.44 feet;
179. N 71°14′37″ W 266.43 feet;
180. N 67°56′20″ W 72.52 feet;
181. N 64°05′13″ W 230.11 feet;
182. N 68°36′52″ W 337.96 feet;
183. N 68°46′07″ W 60.86 feet;
184. N 57°31′28″ W 62.02 feet;
185. N 69°12′17″ W 194.71 feet;
186. N 74°52′18″ W 51.54 feet;
187. N 60°10′12″ W 91.32 feet;
188. N 72°23′57″ W 284.72 feet;
189. N 66°43′26″ W 289.75 feet;
190. N 71°49′29″ W 317.90 feet;
191. N 69°12′03″ W 238.91 feet;
192. N 64°15′14″ W 72.27 feet;
193. S 65°27′32″ W 40.27 feet;
194. N 74°15′53″ W 194.46 feet;
195. N 73°49′49″ W 290.50 feet;
196. N 72°33′14″ W 374.10 feet;
197. N 67°46′21″ W 342.36 feet;
198. N 57°56′05″ W 76.94 feet;
199. N 87°47′11″ W 87.90 feet;
200. N 72°42′55″ W 288.96 feet;
201. N 71°19′03″ W 300.30 feet;
202. N 80°29′32″ W 203.62 feet;
203. S 89°12′33″ W 61.22 feet;
204. N 70°29′19″ W 104.61 feet;
205. N 79°25′58″ W 67.02 feet;
206. N 80°35′31″ W 373.72 feet;
207. N 80°52′09″ W 380.68 feet;
208. N 77°30′29″ W 200.60 feet;
209. S 80°07′35″ W 41.78 feet;
210. N 68°08′20″ W 43.73 feet;
211. N 82°47′20″ W 337.50 feet;
212. N 78°02′35″ W 194.88 feet;
213. N 77°39′54″ W 170.67 feet;
214. N 77°07′59″ W 330.55 feet;
215. N 79°02′44″ W 201.15 feet;
216. N 70°18′48″ W 173.92 feet;

217. N 78°14′27″ W 273.38 feet;
218. N 86°10′16″ W 121.38 feet;
219. N 56°59′20″ W 23.64 feet;
220. N 77°12′59″ W 426.70 feet;
221. N 83°15′03″ W 185.75 feet;
222. N 73°51′47″ W 182.15 feet;
223. N 71°13′45″ W 167.21 feet;
224. S 75°37′59″ W 30.89 feet;
225. N 71°33′44″ W 234.05 feet;
226. N 80°43′52″ W 137.24 feet;
227. N 69°41′51″ W 273.22 feet;
228. N 70°43′07″ W 254.91 feet;
229. N 66°56′08″ W 301.42 feet;
230. N 63°53′15″ W 256.28 feet;
231. N 58°33′26″ W 202.83 feet;
232. N 61°51′11″ W 184.76 feet;
233. N 52°03′07″ W 236.22 feet;
234. N 59°50′41″ W 424.43 feet;
235. N 57°02′33″ W 230.68 feet;
236. N 48°19′51″ W 103.33 feet;
237. N 40°22′48″ W 238.16 feet;
238. N 27°29′10″ W 445.07 feet;
239. N 27°28′12″ W 417.56 feet;
240. N 23°53′28″ W 462.72 feet;
241. N 20°07′44″ W 182.40 feet;
242. N 02°09′48″ W 110.47 feet;
243. N 45°05′17″ W 66.80 feet;
244. N 24°47′08″ W 167.79 feet;
245. N 04°37′48″ E 25.09 feet;
246. N 25°09′10″ W 194.51 feet;
247. N 47°03′42″ W 36.76 feet;
248. N 23°12′08″ W 208.06 feet;
249. N 31°51′35″ W 213.36 feet;
250. N 25°18′01″ W 275.95 feet;
251. N 22°57′02″ W 335.59 feet;
252. N 35°58′44″ W 89.13 feet;
253. N 24°17′16″ W 160.88 feet;
254. N 75°21′26″ W 17.52 feet;
255. N 27°01′17″ W 188.36 feet;
256. N 13°08′58″ W 227.87 feet;
257. N 40°21′42″ W 136.76 feet;
258. N 24°24′56″ W 197.69 feet;
259. N 23°37′41″ W 184.07 feet;
260. N 26°21′53″ W 373.91 feet;
261. N 30°13′30″ W 285.83 feet;
262. N 23°37′13″ W 44.79 feet;
263. N 32°55′17″ W 111.43 feet;
264. N 70°24′21″ W 45.64 feet;
265. N 38°36′29″ W 28.58 feet;
266. N 27°45′40″ W 98.67 feet;
267. N 46°12′44″ W 44.96 feet;
268. N 24°49′30″ W 178.43 feet;
269. N 05°35′47″ E 26.71 feet;
270. N 22°59′42″ W 38.82 feet;
271. N 10°02′49″ E 30.61 feet;
272. N 19°34′05″ W 114.65 feet;
273. N 05°33′59″ E 13.45 feet;
274. N 12°59′57″ W 110.34 feet;
275. N 01°10′59″ E 216.95 feet;
276. N 07°13′33″ E 110.78 feet;
277. N 06°00′55″ E 131.88 feet;
278. N 12°01′16″ E 173.06 feet;
279. N 04°06′19″ W 44.77 feet;
280. N 34°06′19″ E 126.69 feet;
281. N 40°46′38″ E 329.61 feet;
282. N 27°01′26″ E 173.94 feet;
283. N 46°34′13″ E 311.34 feet;
284. N 46°36′53″ E 361.75 feet;
285. N 57°24′33″ E 118.71 feet;
286. N 52°19′49″ E 242.35 feet;
287. N 47°03′21″ E 177.59 feet;
288. N 52°11′08″ E 276.80 feet;
289. N 52°23′33″ E 387.60 feet;
290. N 39°39′32″ E 300.47 feet;
291. N 24°24′38″ E 351.30 feet;
292. N 18°55′03″ E 170.32 feet;
293. N 16°04′01″ E 220.64 feet;
294. N 27°29′02″ E 177.93 feet;
295. N 33°39′19″ E 182.00 feet;
296. N 44°33′29″ E 266.80 feet;
297. N 37°44′11″ E 162.18 feet;
298. N 39°45′24″ E 191.62 feet;
299. N 44°11′35″ E 141.82 feet;
300. N 49°35′13″ E 289.05 feet;
301. N 67°47′17″ E 434.12 feet;
302. N 50°05′56″ E 187.21 feet;

303. N 53°46′23″ E 313.82 feet;
304. N 57°52′30″ E 229.52 feet;
305. N 34°44′43″ E 240.98 feet;
306. N 13°51′55″ E 139.72 feet;
307. N 30°29′51″ E 218.39 feet;
308. N 09°00′09″ E 310.43 feet;
309. N 03°29′17″ E 364.22 feet;
310. N 21°07′35″ E 112.02 feet;
311. N 25°42′13″ E 133.57 feet;
312. N 45°58′18″ E 53.38 feet;
313. N 60°19′59″ E 51.98 feet;
314. N 37°15′32″ E 182.58 feet;
315. N 15°23′58″ E 83.49 feet;
316. N 15°42′01″ E 261.08 feet;
317. N 36°24′20″ W 51.58 feet;
318. N 15°15′01″ E 196.32 feet;
319. N 13°42′25″ W 206.28 feet;
320. N 32°40′58″ E 42.13 feet;
321. N 32°31′26″ E 214.62 feet;
322. N 44°06′21″ E 17.67 feet;
323. N 30°59′00″ E 115.35 feet;
324. N 25°35′07″ E 44.46 feet;
325. N 18°27′29″ E 109.88 feet;
326. N 22°50′29″ E 131.46 feet;
327. N 05°32′17″ E 162.37 feet;
328. N 01°04′56″ W 188.48 feet;
329. N 08°30′21″ W 126.56 feet;
330. N 16°47′18″ E 224.07 feet;
331. N 30°43′44″ E 88.32 feet;
332. N 41°35′58″ E 181.80 feet;
333. N 41°26′54″ E 4.11 feet;
334. N 62°19′06″ E 53.47 feet;
335. N 42°17′15″ E 75.16 feet;
336. N 42°33′08″ E 98.01 feet;
337. N 14°53′12″ E 16.50 feet;
338. N 05°14′15″ W 25.31 feet;
339. N 39°32′31″ E 98.80 feet;
340. N 04°53′40″ W 145.92 feet;
341. N 09°04′54″ E 362.65 feet;
342. N 14°50′01″ E 304.17 feet;
343. N 01°28′58″ E 71.48 feet;
344. N 02°08′33″ E 176.53 feet;
345. N 01°57′51″ W 319.75 feet;
346. N 01°20′24″ W 243.11 feet;
347. N 09°08′02″ E 139.88 feet;
348. N 13°07′32″ W 209.36 feet;
349. N 06°26′13″ W 175.51 feet;
350. N 05°37′45″ W 293.41 feet;
351. N 06°34′59″ W 217.59 feet;
352. N 07°47′48″ W 290.66 feet;
353. N 10°41′30″ W 267.70 feet;
354. N 04°47′01″ W 72.08 feet;
355. N 14°28′47″ W 234.20 feet;
356. N 00°19′43″ W 116.62 feet;
357. N 07°44′46″ W 279.97 feet;
358. N 11°32′18″ W 356.71 feet;
359. N 11°07′49″ W 213.28 feet;
360. N 14°30′09″ W 272.42 feet;
361. N 06°36′37″ W 286.80 feet;
362. N 08°28′38″ W 238.45 feet;
363. N 17°03′40″ W 151.67 feet;
364. N 09°18′29″ W 342.55 feet;
365. N 14°40′23″ W 256.29 feet;
366. N 14°18′03″ W 363.43 feet;
367. N 11°45′38″ E 206.67 feet;
368. N 41°54′52″ E 321.85 feet;
369. N 63°25′44″ E 273.18 feet;
370. S 74°04′12″ E 474.64 feet;
371. N 88°03′52″ E 416.71 feet;
372. S 66°20′00″ E 572.97 feet;
373. S 80°24′37″ E 222.10 feet;
374. S 89°46′40″ E 349.53 feet;
375. N 82°26′19″ E 391.23 feet;
376. N 66°00′59″ E 497.08 feet;
377. N 58°38′57″ E 276.46 feet

to a standard California State Lands Commission brass tablet set in concrete stamped "N–MID–CAL 1981" having California Coordinate System, Zone 6 coordinates of x=2,472,838.61 feet and y=432,666.01 feet, said tablet being located on the westerly boundary of the parcels of land taken by condemnation in *United States* v. *243.25 Acres of*

Land, Civil No. 3505–SD Smith (S. D. Cal. 1973) and *United States* v. *67.57 Acres of Land*, Civil No. 5925–Phx–Craig (D. Ariz. 1972); thence leaving said centerline of the former channel,

378. Northeasterly 278.84 feet along said westerly boundary, being a fixed and limiting boundary of the herein described parcel, on the arc of a curve, concave westerly, having a radius of 15,350 feet, to a point on said curve subtended by a chord which bears N 06°51′25″ E 278.83 feet, said point being monumented with a standard California State Lands Commission brass tablet set in concrete, stamped "N–RB–CAL 1891", having California Coordinate System Zone 6 coordinates of x=2,472,871.90 feet and y=432,942.85 feet, from which California State Lands Commission Monument "PI–14" bears N 29°11′26″ E 613.52 feet, as said monument is shown on said map; thence downstream along a fixed and limiting boundary of the herein described parcel, the following 27 courses:

379. S 47°59′19″ W 68.50 feet;
380. S 60°07′46″ W 395.55 feet;
381. S 63°03′23″ W 406.08 feet;
382. S 82°42′48″ W 307.48 feet;
383. N 87°47′25″ W 311.23 feet;
384. N 73°24′25″ W 206.60 feet;
385. N 58°24′42″ W 393.27 feet;
386. N 67°05′29″ W 259.46 feet;
387. S 84°46′40″ W 186.77 feet;
388. S 73°38′32″ W 305.36 feet;
389. N 68°41′39″ W 214.67 feet;
390. N 85°22′33″ W 272.89 feet;
391. S 75°15′23″ W 216.12 feet;
392. S 50°14′50″ W 139.18 feet;
393. S 43°55′50″ W 265.21 feet;
394. S 46°19′31″ W 275.14 feet;
395. S 15°12′01″ W 206.91 feet;
396. S 26°13′45″ E 157.09 feet;
397. S 19°00′46″ E 279.67 feet;
398. S 29°05′57″ E 98.41 feet;
399. S 18°06′17″ E 215.54 feet;
400. S 06°52′21″ E 382.84 feet;
401. S 05°18′02″ E 273.86 feet;
402. S 08°14′28″ E 324.68 feet;
403. S 13°16′00″ E 308.30 feet;
404. S 09°19′42″ E 216.36 feet;
405. S 11°35′03″ E 233.81 feet,

to a point having California Coordinate System, Zone 6 coordinates of x=2,469,569.55 feet and y=429,-714.41 feet; thence,

406. S 78°09′23″ W 18 feet, more or less, to the special meander corner for Section 1, T10S, R21E, SBM, as shown on the United States Bureau of Land Management plat accepted October, 1961; thence downstream along a fixed and limiting boundary of the herein described parcel, the following 21 courses:

407. S 11°50′34″ E 659.97 feet to United States Bureau of Land Management monument AP 1
408. S 06°05′34″ E 745.77 feet to United States Bureau of Land Management monument AP 2
409. S 00°09′26″ W 461.98 feet to United States Bureau of Land Management monument AP 3
410. S 00°50′34″ E 329.98 feet to United States Bureau of Land Management monument AP 4
411. S 03°20′26″ W 454.72 feet to United States Bureau of Land Management monument AP 5

412. S 06°54′26″ W 514.78 feet to United States Bureau of Land Management monument AP 6

413. S 34°39′26″ W 257.39 feet to United States Bureau of Land Management monument AP 7

414. S 14°39′26″ W 296.99 feet to United States Bureau of Land Management monument AP 8

415. S 42°54′26″ W 567.57 feet to United States Bureau of Land Management monument AP 9

416. S 52°39′26″ W 237.59 feet to United States Bureau of Land Management monument AP 10

417. S 36°54′26″ W 389.38 feet to United States Bureau of Land Management monument AP 11

418. S 02°09′26″ W 329.98 feet to United States Bureau of Land Management monument AP 12

419. S 11°39′26″ W 356.38 feet to United States Bureau of Land Management monument AP 13

420. S 06°05′34″ E 362.98 feet to United States Bureau of Land Management monument AP 14

421. S 15°20′34″ E 448.78 feet to United States Bureau of Land Management monument AP 15

422. S 01°20′34″ E 230.99 feet to United States Bureau of Land Management monument AP 16

423. S 20°24′26″ W 428.98 feet to United States Bureau of Land Management monument AP 17

424. S 16°54′26″ W 593.97 feet to United States Bureau of Land Management monument AP 18

425. S 27°39′26″ W 415.78 feet to United States Bureau of Land Management monument AP 19

426. S 30°39′26″ W 230.99 feet;

427. S 61°18′26″ W 392.02 feet, to the Witness Point between Sections 12 and 13, T10S, R21E, SBM, as shown on said plat, accepted October, 1961; thence continuing downstream along a fixed and limiting boundary,

428. S 54°06′09″ W 841 feet, more or less, to the Witness Point between Sections 13 and 14, T10S, R21E, SBM, as shown on said plat, accepted October, 1961; thence continuing downstream along a fixed and limiting boundary of the herein described parcel, the following two courses:

429. S 22°09′26″ W 475.18 feet;

430. S 30°33′26″ W 1207.08 feet, to the special meander corner on the extension of the East 1/16 line of Section 14, T10S, R21E, SBM, as shown on said plat, accepted October, 1961; thence,

431. S 44°09′26″ W 1476.35 feet, to the special meander corner on the extension of the East-West centerline of Section 14, T10S, R22E, SBM, as shown on said plat; thence continuing downstream along a fixed and limiting boundary of the herein described parcel, the following five courses:

432. S 48°39′26″ W 950.36 feet;

433. S 07°24′26″ W 329.98 feet;

434. S 38°54′26″ W 475.18 feet;

435. S 07°24′26″ W 600.57 feet;

436. S 06°56′34″ E 441.52 feet, to the meander corner between Sections 14 and 23, T10S, R21E, SBM, as shown on said plat accepted October, 1961; thence,

437. N 83°03'26" E 14 feet, more or less, to a point having California Coordinate System, Zone 6 coordinates of x=2,464,185.22 feet and y=416,378.36 feet; thence, continuing downstream along a fixed and limiting boundary the following ten courses:

438. S 22°59'42" E 50.57 feet;
439. S 05°35'47" W 53.42 feet;
440. S 19°17'00" E 81.15 feet;
441. S 28°44'01" E 98.45 feet;
442. S 46°12'44" E 89.91 feet;
443. S 00°54'42" E 38.96 feet;
444. S 38°36'29" E 57.16 feet;
445. S 70°24'21" E 91.28 feet;
446. S 23°37'13" E 89.57 feet;
447. S 32°17'14" E 170.27 feet, to a point having California Coordinate System, Zone 6 coordinates of x=2,464,587.93 feet and y=415,713.24 feet; thence,

448. S 22°34'09" E 73 feet, more or less, to a point being the northeasterly corner of Parcel 2, as said Parcel 2 is described in the deed recorded in Book 1423 of Official Records, page 1774, in the Office of the County Recorder of Imperial County, State of California; thence,

449. S 22°34'09" E 107 feet, more or less, to a point having California Coordinate System, Zone 6 coordinates of x=2,464,656.97 feet and y=415,547.13 feet; thence, the following 14 courses:

450. S 19°52'01" E 161.22 feet;
451. S 10°45'08" E 150.08 feet;
452. S 19°26'18" E 188.71 feet;
453. S 22°09'00" E 187.41 feet;
454. S 29°58'22" E 202.91 feet;
455. S 22°45'08" E 214.61 feet;
456. S 28°14'06" E 224.50 feet;
457. S 75°21'26" E 35.05 feet;
458. S 06°53'21" W 31.35 feet;
459. S 38°50'29" E 73.95 feet;
460. S 33°57'12" E 104.47 feet;
461. S 10°37'44" E 105.61 feet;
462. S 21°52'27" E 165.04 feet;
463. S 24°30'08" E 342.15 feet, to a point having California Coordinate System, Zone 6 coordinates of x=2,465,521.55 feet and y=413,572.51 feet; thence,

464. S 26°07'31" E 14 feet, more or less, to a point being the southeasterly corner of said Parcel 2; thence,

465. S 26°07'31" E 210 feet, more or less, to a point having California Coordinate System, Zone 6 coordinates of x=2,465,620.31 feet and y=413,371.14 feet; thence, the following 55 courses:

466. S 26°00'19" E 171.65 feet;
467. S 47°03'42" E 73.52 feet;
468. S 22°51'02" E 179.82 feet;
469. S 04°37'48" W 50.17 feet;
470. S 27°58'13" E 111.98 feet;
471. S 45°05'17" E 133.59 feet;
472. S 09°12'54" W 49.89 feet;
473. S 23°46'02" E 206.79 feet;
474. S 20°19'41" E 209.44 feet;
475. S 18°05'12" E 233.53 feet;
476. S 26°51'02" E 250.32 feet;
477. S 23°56'13" E 170.98 feet;
478. S 29°41'34" E 147.69 feet;
479. S 11°42'23" E 98.92 feet;
480. S 32°35'31" E 124.16 feet;
481. S 30°53'45" E 120.22 feet;
482. S 43°07'02" E 256.53 feet;
483. S 48°19'51" E 206.65 feet;
484. S 67°52'30" E 183.87 feet;
485. S 71°21'51" E 136.25 feet;
486. S 61°15'46" E 196.34 feet;
487. S 54°59'08" E 212.50 feet;

488. S 55°04′36″ E 191.73 feet;
489. S 61°25′23″ E 161.91 feet;
490. S 52°43′26″ E 189.29 feet;
491. S 62°32′05″ E 229.42 feet;
492. S 24°40′26″ W 24.12 feet;
493. S 31°03′06″ E 16.75 feet;
494. N 51°04′31″ E 31.74 feet;
495. S 66°58′16″ E 156.62 feet;
496. S 63°57′36″ E 190.86 feet;
497. S 70°39′01″ E 283.46 feet;
498. S 67°09′09″ E 279.07 feet;
499. N 79°03′56″ E 50.29 feet;
500. S 71°21′30″ E 97.26 feet;
501. S 77°39′39″ E 196.21 feet;
502. S 72°52′22″ E 211.00 feet;
503. S 71°11′05″ E 169.14 feet;
504. N 88°21′14″ E 132.27 feet;
505. S 79°17′01″ E 190.11 feet;
506. S 75°43′12″ E 311.68 feet;
507. S 56°59′20″ E 47.28 feet;
508. N 79°03′56″ E 33.53 feet;
509. S 76°25′43″ E 351.79 feet;
510. S 61°59′02″ E 99.95 feet;
511. S 78°10′25″ E 224.11 feet;
512. S 79°43′39″ E 181.74 feet;
513. S 78°05′30″ E 151.35 feet;
514. S 75°07.34″ E 191.59 feet;
515. S 81°32′25″ E 212.22 feet;
516. S 78°59′26″ E 180.24 feet;
517. S 87°17′16″ E 140.12 feet;
518. S 68°08′20″ E 87.47 feet;
519. N 80°07′35″ E 83.57 feet;
520. S 80°39′14″ E 136.27 feet, to a point having California Coordinate System, Zone 6 coordinates of x=2,472,454.64 feet and y=409,-154.43 feet; thence,

521. S 80°14′07″ E 107 feet, more or less, to the true point for the meander corner of the westerly line of fractional Section 30, T10S, R22E, SBM, as said meander corner is shown on the United States Bureau of Land Management plat, accepted July, 1963; thence downstream along a fixed and limiting boundary of the herein described parcel, the following six courses:

522. S 79°30′46″ E 676.47 feet;
523. S 78°54′46″ E 609.81 feet;
524. S 69°05′46″ E 277.19 feet;
525. S 75°51′46″ E 209.87 feet;
526. S 64°51′46″ E 317.45 feet;
527. S 71°28′46″ E 374.20 feet, to the true point for the special meander corner at the termination of the division line in said Section 30, as shown on said plat; thence,

528. N 17°19′32″ E 3 feet, more or less, to a point having California Coordinate System, Zone 6 coordinates of x=2,474,929.38 feet and y=408,495.31 feet; thence the following 63 courses:

529. S 72°40′28″ E 48.56 feet;
530. S 72°44′56″ E 272.15 feet;
531. S 76°31′58″ E 278.42 feet;
532. S 70°49′35″ E 238.47 feet;
533. S 70°17′22″ E 299.32 feet;
534. S 68°27′11″ E 309.01 feet;
535. S 72°00′50″ E 312.35 feet;
536. S 53°14′15″ E 54.49 feet;
537. S 74°52′18″ E 103.07 feet;
538. S 66°22′25″ E 160.16 feet;
539. S 31°14′08″ E 22.41 feet;
540. S 68°46′07″ E 121.72 feet;
541. S 69°49′10″ E 306.13 feet;
542. S 66°14′00″ E 322.42 feet;
543. S 63°00′21″ E 301.63 feet;
544. S 58°19′24″ E 137.83 feet;
545. S 64°23′36″ E 374.30 feet;
546. S 58°39′16″ E 183.74 feet;
547. S 64°07′26″ E 125.36 feet;
548. S 40°17′37″ E 24.04 feet;
549. S 63°33′22″ E 124.65 feet;
550. S 55°37′48″ E 257.52 feet;

551. S 68°31′00″ E 87.95 feet;
552. S 56°32′33″ E 149.69 feet;
553. S 57°13′54″ E 219.68 feet;
554. S 52°33′43″ E 91.99 feet;
555. S 75°39′40″ E 30.77 feet;
556. S 51°17′24″ E 169.35 feet;
557. S 54°59′34″ E 156.48 feet;
558. S 50°10′27″ E 260.94 feet;
559. S 49°36′24″ E 258.49 feet;
560. S 44°34′13″ E 163.10 feet;
561. S 37°26′05″ E 300.23 feet;
562. S 42°48′59″ E 170.19 feet;
563. S 33°29′47″ E 265.71 feet;
564. S 33°01′00″ E 255.36 feet;
565. S 29°18′07″ E 246.50 feet;
566. S 33°35′14″ E 95.73 feet;
567. S 20°47′02″ E 113.97 feet;
568. S 20°23′07″ E 207.22 feet;
569. S 10°30′21″ E 96.42 feet;
570. S 13°36′45″ E 235.13 feet;
571. S 19°38′33″ E 122.74 feet;
572. S 25°57′07″ E 104.91 feet;
573. S 27°15′17″ E 228.13 feet;
574. S 36°19′37″ E 128.72 feet;
575. S 24°33′34″ E 121.02 feet;
576. S 29°04′39″ E 145.68 feet;
577. S 26°59′27″ E 265.97 feet;
578. S 25°47′03″ E 364.93 feet;
579. S 18°56′14″ E 81.90 feet;
580. S 30°01′37″ E 91.68 feet;
581. S 24°08′33″ E 324.37 feet;
582. S 21°12′50″ E 302.39 feet;
583. S 26°21′17″ E 109.66 feet;
584. S 17°44′09″ E 132.95 feet;
585. S 14°17′33″ E 225.66 feet;
586. S 08°53′11″ E 181.58 feet;
587. S 01°08′01″ E 92.51 feet;
588. S 05°10′25″ E 229.55 feet;
589. S 02°20′32″ W 225.35 feet;
590. S 09°55′39″ W 285.43 feet;
591. S 17°15′36″ W 182.74 feet;
592. S 29°35′16″ W 133.46 feet, to a point having California Coordinate System, Zone 6 coordinates of x=2,482,137.72 feet and y=400,326.43 feet; thence,

593. N 60°24′44″ W 15 feet, more or less, to the meander corner between Section 32, T10S, R22E, SBM and Section 5, T11S, R22E, SBM, as shown on the United States Bureau of Land Management plat accepted May, 1962; thence downstream along a fixed and limiting boundary of the herein described parcel, the following 21 courses:

594. S 44°08′31″ W 270.48 feet;
595. S 61°23′31″ W 738.88 feet;
596. S 64°38′31″ W 263.88 feet;
597. S 67°38′31″ W 402.42 feet;
598. S 54°38′31″ W 296.87 feet;
599. S 47°53′31″ W 257.28 feet;
600. S 42°23′31″ W 527.76 feet;
601. S 44°53′31″ W 329.85 feet;
602. S 34°23′31″ W 250.69 feet;
603. S 49°38′31″ W 659.70 feet;
604. S 52°23′31″ W 323.25 feet;
605. S 58°23′31″ W 415.61 feet;
606. S 56°08′31″ W 171.52 feet;
607. S 59°34′31″ W 286.31 feet;
608. S 57°08′31″ W 125.34 feet;
609. S 63°53′31″ W 369.43 feet;
610. S 38°08′31″ W 765.25 feet;
611. S 15°36′29″ E 237.49 feet;
612. S 21°21′29″ E 435.40 feet;
613. S 11°06′29″ E 316.66 feet;
614. S 22°35′29″ E 625 feet, more or less, to the true point for the meander corner between Sections 6 and 7, T11S, R22E, SBM, as shown on said plat; thence

615. N 65°19′54″ E 15 feet, more or less, to a point having California Coordinate System, Zone 6 coordinates of x=2,477,639.57 feet and

y=394,914.38 feet; thence the following 75 courses:

616. S 24°40′06″ E 15.23 feet;
617. S 30°48′33″ E 201.41 feet;
618. S 32°35′32″ E 240.99 feet;
619. S 41°33′23″ E 64.16 feet;
620. S 06°27′39″ E 41.95 feet;
621. S 44°47′21″ E 42.30 feet;
622. S 31°10′03″ E 290.43 feet;
623. S 30°20′17″ E 193.21 feet;
624. S 35°31′37″ E 230.58 feet;
625. S 33°32′33″ E 109.82 feet;
626. S 31°07′03″ E 291.64 feet;
627. S 35°58′44″ E 110.62 feet;
628. S 29°31′41″ E 141.28 feet;
629. S 36°50′40″ E 193.40 feet;
630. S 49°35′07″ E 90.66 feet;
631. S 30°07′37″ E 233.52 feet;
632. S 31°53′02″ E 251.15 feet;
633. S 36°13′48″ E 203.04 feet;
634. S 46°06′54″ E 83.21 feet;
635. S 71°32′41″ E 26.63 feet;
636. S 37°18′41″ E 91.38 feet;
637. S 34°03′47″ E 113.30 feet;
638. S 26°18′12″ E 105.77 feet;
639. S 41°04′58″ E 109.72 feet;
640. S 31°06′48″ E 112.40 feet;
641. S 44°54′33″ E 116.06 feet;
642. S 26°40′57″ W 28.35 feet;
643. S 33°31′01″ E 219.44 feet;
644. S 44°43′41″ E 147.52 feet;
645. S 35°46′12″ E 92.93 feet;
646. S 40°14′44″ E 131.38 feet;
647. S 07°04′43″ W 41.30 feet;
648. S 69°06′50″ E 25.81 feet;
649. S 38°04′24″ E 119.03 feet;
650. S 42°30′44″ E 98.39 feet;
651. S 31°35′31″ E 120.76 feet;
652. S 34°30′30″ E 195.40 fe[illegible];
653. S 28°01′14″ E 117.07 fe[illegible];
654. S 32°38′46″ E 156.49 feet;
655. S 11°54′21″ E 34.12 feet;
656. S 39°20′10″ E 130.18 feet;
657. S 34°12′23″ E 153.60 feet;
658. S 21°29′38″ E 46.34 feet;
659. S 47°44′29″ E 81.61 feet;
660. S 30°52′09″ E 78.84 feet;
661. S 57°36′19″ E 106.99 feet;
662. S 37°14′12″ E 256.55 feet;
663. S 39°58′33″ E 258.69 feet;
664. S 45°46′13″ E 91.01 feet;
665. S 31°33′36″ E 94.10 feet;
666. S 57°50′57″ W 26.33 feet;
667. S 07°09′59″ E 20.60 feet;
668. S 78°52′10″ E 63.92 feet;
669. S 07°28′16″ E 22.99 feet;
670. S 32°48′30″ E 160.95 feet;
671. S 24°10′21″ E 195.83 feet;
672. S 30°32′33″ E 247.57 feet;
673. S 31°56′13″ E 71.89 feet;
674. S 03°23′22″ E 32.31 feet;
675. S 32°31′22″ E 188.29 feet;
676. S 28°02′01″ E 196.47 feet;
677. S 18°34′38″ E 110.90 feet;
678. S 11°10′23″ E 66.47 feet;
679. S 33°58′06″ E 59.38 feet;
680. S 02°15′15″ W 31.52 feet;
681. S 27°25′03″ E 115.12 feet;
682. S 19°18′42″ E 76.05 feet;
683. S 01°27′20″ E 26.77 feet;
684. S 17°11′36″ E 236.98 feet;
685. S 10°46′23″ E 62.38 feet;
686. S 18°31′39″ E 99.70 feet;
687. S 21°27′16″ E 182.39 feet;
688. S 48°21′04″ E 40.40 feet;
689. S 07°51′38″ W 195.38 feet;
690. S 09°17′17″ W 123.85 feet,

to a point having California Coordinate System, Zone 6 coordinates of x=2,482,240.84 feet and y=387,-264.05 feet as said point is shown on the Davis Lake Area Project Administrative Maps, hereinbefore described; thence,

691. S 77°38'10" E 213.25 feet, to a point on the centerline of the former channel of the Colorado River, said point also being the point of beginning of the herein described parcel of land.

Bearings and distances in the above description are based on the California Coordinate System, Zone 6.

EXHIBIT B

A parcel of land in the former channel of the Colorado River in Imperial County, California, and Yuma County, Arizona, adjacent to Township 1 South, Range 24 West, Gila and Salt River Meridian; Township 2 South, Range 24 West, Gila and Salt River Meridian; Township 2 South, Range 23 West, Gila and Salt River Meridian, more particularly described as follows:

BEGINNING at a point on the center line of the former channel of the Colorado River having California Coordinate System, Zone 6, coordinates of x=2,482,449.14 feet and y=387,218.39 feet, from which United States Water and Power Resources Service (formerly United States Bureau of Reclamation) Station RUIN bears N 56°27'07" E 733.37 feet, as said points are shown on the map entitled, "Davis Lake Area Project Administrative Maps", said map approved October 28, 1976 by the California State Lands Commission, and being on file at the offices of said Commission in Sacramento, California; thence from said point of beginning, upstream along the center line of the former channel of the Colorado River, said center line being a fixed and limiting boundary of the herein described parcel, the following 377 courses:

1. N 06°11'02" E 91.76 feet;
2. N 54°12'32" E 18.78 feet;
3. N 12°45'10" E 174.75 feet;
4. N 12°53'00" W 103.53 feet;
5. N 05°09'17" W 146.10 feet;
6. N 13°58'10" E 87.64 feet;
7. N 05°10'13" W 66.53 feet;
8. N 23°31'10" E 26.95 feet;
9. N 36°32'17" E 111.82 feet;
10. N 19°17'18" W 275.69 feet;
11. N 04°49'28" W 45.39 feet;
12. N 25°30'26" W 64.01 feet;
13. N 21°45'19" W 170.09 feet;
14. N 02°16'16" E 15.76 feet;
15. N 26°25'14" W 142.77 feet;
16. N 19°59'28" W 151.68 feet;

17. N 32°00′03″ W 345.18 feet;
18. N 03°24′14″ W 16.15 feet;
19. N 34°25′41″ W 352.66 feet;
20. N 30°34′31″ W 260.03 feet;
21. N 36°46′58″ W 310.64 feet;
22. N 41°48′53″ W 306.12 feet;
23. N 40°25′19″ W 290.08 feet;
24. N 44°30′49″ W 169.94 feet;
25. N 30°52′29″ W 39.42 feet;
26. N 47°44′12″ W 40.80 feet;
27. N 21°30′40″ W 23.17 feet;
28. N 34°34′58″ W 209.82 feet;
29. N 34°44′50″ W 317.95 feet;
30. N 34°44′47″ W 291.32 feet;
31. N 37°31′17″ W 279.41 feet;
32. N 36°05′21″ W 275.56 feet;
33. N 37°39′47″ W 240.96 feet;
34. N 32°03′44″ W 164.74 feet;
35. N 26°41′11″ E 14.17 feet;
36. N 37°08′14″ W 33.36 feet;
37. N 35°36′16″ W 86.74 feet;
38. N 39°41′49″ W 66.46 feet;
39. N 37°12′59″ W 163.13 feet;
40. N 28°19′51″ W 220.22 feet;
41. N 34°33′42″ W 149.82 feet;
42. N 39°16′54″ W 17.91 feet;
43. N 46°59′54″ W 65.69 feet;
44. N 36°45′41″ W 175.14 feet;
45. N 30°48′13″ W 247.89 feet;
46. N 35°33′18″ W 233.54 feet;
47. N 42°45′30″ W 301.59 feet;
48. N 29°31′50″ W 70.64 feet;
49. N 39°15′12″ W 181.84 feet;
50. N 34°08′26″ W 287.28 feet;
51. N 36°56′15″ W 341.54 feet;
52. N 33°51′40″ W 248.93 feet;
53. N 30°53′53″ W 227.36 feet;
54. N 28°52′32″ W 133.47 feet;
55. N 41°33′10″ W 32.08 feet;
56. N 32°30′33″ W 214.79 feet;
57. N 32°47′41″ W 159.63 feet;
58. N 41°44′15″ W 149.07 feet;
59. N 51°38′10″ W 15.67 feet;
60. N 29°44′55″ W 238.30 feet;
61. N 25°49′43″ W 111.43 feet;
62. N 09°13′34″ W 69.07 feet;
63. N 21°53′52″ W 147.48 feet;
64. N 65°05′19″ W 9.15 feet;
65. N 32°30′38″ W 38.27 feet;
66. N 21°01′27″ W 83.19 feet;
67. N 10°39′51″ E 44.53 feet;
68. N 02°15′38″ W 45.67 feet;
69. N 44°22′08″ W 27.00 feet;
70. N 20°34′25″ W 93.00 feet;
71. N 18°23′16″ W 48.78 feet;
72. N 16°26′02″ W 95.55 feet;
73. N 04°26′34″ W 49.11 feet;
74. N 08°54′12″ W 109.59 feet;
75. N 45°00′45″ W 15.45 feet;
76. N 15°52′18″ W 46.11 feet;
77. N 23°50′06″ E 50.55 feet;
78. N 06°27′18″ W 28.68 feet;
79. N 29°30′20″ W 14.62 feet;
80. N 15°29′04″ E 39.92 feet;
81. N 28°23′27″ E 42.72 feet;
82. N 23°04′47″ E 132.80 feet;
83. N 47°17′33″ E 256.64 feet;
84. N 48°40′23″ E 89.15 feet;
85. N 52°50′14″ E 286.63 feet;
86. N 59°57′29″ E 156.23 feet;
87. N 62°51′03″ E 103.67 feet;
88. N 60°52′13″ E 166.51 feet;
89. N 57°00′27″ E 53.17 feet;
90. N 57°43′27″ E 326.93 feet;
91. N 68°38′25″ E 38.74 feet;
92. N 45°44′50″ E 25.05 feet;
93. N 60°53′25″ E 148.11 feet;
94. N 52°28′50″ E 136.72 feet;
95. N 53°48′33″ E 194.46 feet;
96. N 53°11′16″ E 49.55 feet;
97. N 80°15′07″ E 22.12 feet;
98. N 50°13′23″ E 181.66 feet;
99. N 69°57′50″ E 40.08 feet;
100. N 34°56′12″ E 24.41 feet;
101. N 50°47′14″ E 202.15 feet;
102. N 61°59′40″ E 50.34 feet;

103. N 47°49′50″ E 49.76 feet;
104. N 48°09′42″ E 163.97 feet;
105. N 50°09′37″ E 112.15 feet;
106. N 27°22′23″ E 134.94 feet;
107. N 47°51′44″ E 124.47 feet;
108. N 46°01′44″ E 142.53 feet;
109. N 39°04′50″ E 180.94 feet;
110. N 45°09′21″ E 189.68 feet;
111. N 39°57′52″ E 156.08 feet;
112. N 43°26′27″ E 199.19 feet;
113. N 52°12′27″ E 221.41 feet;
114. N 50°29′55″ E 152.42 feet;
115. N 52°54′27″ E 179.48 feet;
116. N 62°15′35″ E 213.37 feet;
117. N 68°45′32″ E 55.26 feet;
118. N 67°29′40″ E 76.60 feet;
119. N 65°41′07″ E 165.43 feet;
120. N 67°14′09″ E 294.39 feet;
121. N 64°24′36″ E 128.78 feet;
122. N 53°03′32″ E 106.15 feet;
123. N 70°17′39″ E 35.29 feet;
124. N 73°29′13″ E 147.47 feet;
125. N 59°19′13″ E 74.01 feet;
126. N 30°28′52″ E 18.53 feet;
127. N 60°22′22″ E 71.20 feet;
128. N 18°45′56″ E 28.50 feet;
129. N 39°20′12″ E 181.32 feet;
130. N 15°18′44″ E 22.87 feet;
131. N 34°48′05″ E 113.34 feet;
132. N 01°37′33″ E 25.20 feet;
133. N 20°03′20″ E 279.59 feet;
134. N 08°48′55″ E 494.65 feet;
135. N 06°07′16″ W 329.64 feet;
136. N 01°08′01″ W 46.25 feet;
137. N 12°04′58″ W 216.22 feet;
138. N 02°16′55″ E 41.56 feet;
139. N 12°25′25″ W 199.17 feet;
140. N 27°14′52″ W 38.46 feet;
141. N 20°48′06″ W 242.26 feet;
142. N 19°51′45″ W 337.38 feet;
143. N 24°07′19″ W 226.77 feet;
144. N 27°31′47″ W 169.08 feet;
145. N 25°20′37″ W 190.07 feet;
146. N 27°40′18″ W 329.72 feet;
147. N 28°56′10″ W 330.72 feet;
148. N 24°33′34″ W 60.51 feet;
149. N 29°27′35″ W 208.29 feet;
150. N 28°05′26″ W 247.46 feet;
151. N 23°44′10″ W 163.83 feet;
152. N 13°09′48″ W 254.49 feet;
153. N 19°22′18″ W 307.39 feet;
154. N 21°47′25″ W 159.63 feet;
155. N 30°33′33″ W 99.94 feet;
156. N 29°12′13″ W 207.55 feet;
157. N 31°55′33″ W 235.86 feet;
158. N 28°51′47″ W 106.13 feet;
159. N 36°40′00″ W 174.32 feet;
160. N 02°47′21″ E 19.11 feet;
161. N 43°43′57″ W 240.40 feet;
162. N 41°01′16″ W 304.70 feet;
163. N 46°54′46″ W 122.65 feet;
164. N 40°49′49″ W 90.29 feet;
165. N 51°59′40″ W 174.20 feet;
166. N 44°21′26″ W 78.79 feet;
167. N 54°41′29″ W 220.08 feet;
168. N 53°16′11″ W 329.75 feet;
169. N 61°51′41″ W 110.58 feet;
170. N 52°54′43″ W 215.67 feet;
171. N 58°08′36″ W 153.28 feet;
172. N 59°29′55″ W 174.49 feet;
173. N 56°21′47″ W 191.68 feet;
174. S 89°23′45″ W 20.87 feet;
175. N 62°40′51″ W 144.58 feet;
176. N 60°27′35″ W 329.61 feet;
177. N 58°43′43″ W 350.72 feet;
178. N 49°48′54″ W 206.44 feet;
179. N 71°14′37″ W 266.43 feet;
180. N 67°56′20″ W 72.52 feet;
181. N 64°05′13″ W 230.11 feet;
182. N 68°36′52″ W 337.96 feet;
183. N 68°46′07″ W 60.86 feet;
184. N 57°31′28″ W 62.02 feet;
185. N 69°12′17″ W 194.71 feet;
186. N 74°52′18″ W 51.54 feet;
187. N 60°10′12″ W 91.32 feet;
188. N 72°23′57″ W 284.72 feet;

189. N 66°43′26″ W 289.75 feet;
190. N 71°49′29″ W 317.90 feet;
191. N 69°12′03″ W 238.91 feet;
192. N 64°15′14″ W 72.27 feet;
193. S 65°27′32″ W 40.27 feet;
194. N 74°15′53″ W 194.46 feet;
195. N 73°49′49″ W 290.50 feet;
196. N 72°33′14″ W 374.10 feet;
197. N 67°46′21″ W 342.36 feet;
198. N 57°56′05″ W 76.94 feet;
199. N 87°47′11″ W 87.90 feet;
200. N 72°42′55″ W 288.96 feet;
201. N 71°19′03″ W 300.30 feet;
202. N 80°29′32″ W 203.62 feet;
203. S 89°12′33″ W 61.22 feet;
204. N 70°29′19″ W 104.61 feet;
205. N 79°25′58″ W 67.02 feet;
206. N 80°35′31″ W 373.72 feet;
207. N 80°52′09″ W 380.68 feet;
208. N 77°30′29″ W 200.60 feet;
209. S 80°07′35″ W 41.78 feet;
210. N 68°08′20″ W 43.73 feet;
211. N 82°47′20″ W 337.50 feet;
212. N 78°02′35″ W 194.88 feet;
213. N 77°39′54″ W 170.67 feet;
214. N 77°07′59″ W 330.55 feet;
215. N 79°02′44″ W 201.15 feet;
216. N 70°18′48″ W 173.92 feet;
217. N 78°14′27″ W 273.38 feet;
218. N 86°10′16″ W 121.38 feet;
219. N 56°59′20″ W 23.64 feet;
220. N 77°12′59″ W 426.70 feet;
221. N 83°15′03″ W 185.75 feet;
222. N 73°51′47″ W 182.15 feet;
223. N 71°13′45″ W 167.21 feet;
224. S 75°37′59″ W 30.89 feet;
225. N 71°33′44″ W 234.05 feet;
226. N 80°43′52″ W 137.24 feet;
227. N 69°41′51″ W 273.22 feet;
228. N 70°43′07″ W 254.91 feet;
229. N 66°56′08″ W 301.42 feet;
230. N 63°53′15″ W 256.28 feet;
231. N 58°33′26″ W 202.83 feet;
232. N 61°51′11″ W 184.76 feet;
233. N 52°03′07″ W 236.22 feet;
234. N 59°50′41″ W 424.43 feet;
235. N 57°02′33″ W 230.68 feet;
236. N 48°19′51″ W 103.33 feet;
237. N 40°22′48″ W 238.16 feet;
238. N 27°29′10″ W 445.07 feet;
239. N 27°28′12″ W 417.56 feet;
240. N 23°53′28″ W 462.72 feet;
241. N 20°07′44″ W 182.40 feet;
242. N 02°09′48″ W 110.47 feet;
243. N 45°05′17″ W 66.80 feet;
244. N 24°47′08″ W 167.79 feet;
245. N 04°37′48″ E 25.09 feet;
246. N 25°09′10″ W 194.51 feet;
247. N 47°03′42″ W 36.76 feet;
248. N 23°12′08″ W 208.06 feet;
249. N 31°51′35″ W 213.36 feet;
250. N 25°18′01″ W 275.95 feet;
251. N 22°57′02″ W 335.59 feet;
252. N 35°58′44″ W 89.13 feet;
253. N 24°17′16″ W 160.88 feet;
254. N 75°21′26″ W 17.52 feet;
255. N 27°01′17″ W 188.36 feet;
256. N 13°08′58″ W 227.87 feet;
257. N 40°21′42″ W 136.76 feet;
258. N 24°24′56″ W 197.69 feet;
259. N 23°37′41″ W 184.07 feet;
260. N 26°21′53″ W 373.91 feet;
261. N 30°13′30″ W 285.83 feet;
262. N 23°37′13″ W 44.79 feet;
263. N 32°55′17″ W 111.43 feet;
264. N 70°24′21″ W 45.64 feet;
265. N 38°36′29″ W 28.58 feet;
266. N 27°45′40″ W 98.67 feet;
267. N 46°12′44″ W 44.96 feet;
268. N 24°49′30″ W 178.43 feet;
269. N 05°35′47″ E 26.71 feet;
270. N 22°59′42″ W 38.82 feet;
271. N 10°02′49″ E 30.61 feet;
272. N 19°34′05″ W 114.65 feet;
273. N 05°33′59″ E 13.45 feet;
274. N 12°59′57″ W 110.34 feet;

275. N 01°10′59″ E 216.95 feet;
276. N 07°13′33″ E 110.78 feet;
277. N 06°00′55″ E 131.88 feet;
278. N 12°01′16″ E 173.06 feet;
279. N 04°06′19″ W 44.77 feet;
280. N 34°06′19″ E 126.69 feet;
281. N 40°46′38″ E 329.61 feet;
282. N 27°01′26″ E 173.94 feet;
283. N 46°34′13″ E 311.34 feet;
284. N 46°36′53″ E 361.75 feet;
285. N 57°24′33″ E 118.71 feet;
286. N 52°19′49″ E 242.35 feet;
287. N 47°03′21″ E 177.59 feet;
288. N 52°11′08″ E 276.80 feet;
289. N 52°23′33″ E 387.60 feet;
290. N 39°39′32″ E 300.47 feet;
291. N 24°24′38″ E 351.30 feet;
292. N 18°55′03″ E 170.32 feet;
293. N 16°04′01″ E 220.64 feet;
294. N 27°29′02″ E 177.93 feet;
295. N 33°39′19″ E 182.00 feet;
296. N 44°33′29″ E 266.80 feet;
297. N 37°44′11″ E 162.18 feet;
298. N 39°45′24″ E 191.62 feet;
299. N 44°11′35″ E 141.82 feet;
300. N 49°35′13″ E 289.05 feet;
301. N 67°47′17″ E 434.12 feet;
302. N 50°05′56″ E 187.21 feet;
303. N 53°46′23″ E 313.82 feet;
304. N 57°52′30″ E 229.52 feet;
305. N 34°44′43″ E 240.98 feet;
306. N 13°51′35″ E 139.72 feet;
307. N 30°29′51″ E 218.39 feet;
308. N 09°00′09″ E 310.43 feet;
309. N 03°29′17″ E 364.22 feet;
310. N 21°07′35″ E 112.02 feet;
311. N 25°42′13″ E 133.57 feet;
312. N 45°58′18″ E 53.38 feet;
313. N 60°19′59″ E 51.98 feet;
314. N 37°15′32″ E 182.58 feet;
315. N 15°23′58″ E 83.49 feet;
316. N 15°42′01″ E 261.08 feet;
317. N 36°24′20″ W 51.58 feet;
318. N 15°15′01″ E 196.32 feet;
319. N 13°42′25″ W 206.28 feet;
320. N 32°40′58″ E 42.13 feet;
321. N 32°31′26″ E 214.62 feet;
322. N 44°06′21″ E 17.67 feet;
323. N 30°59′00″ E 115.35 feet;
324. N 25°35′07″ E 44.46 feet;
325. N 18°27′29″ E 109.88 feet;
326. N 22°50′29″ E 131.46 feet;
327. N 05°32′17″ E 162.37 feet;
328. N 01°04′56″ W 188.48 feet;
329. N 08°30′21″ W 126.56 feet;
330. N 16°47′18″ E 224.07 feet;
331. N 30°43′44″ E 88.32 feet;
332. N 41°35′58″ E 181.80 feet;
333. N 41°26′54″ E 4.11 feet;
334. N 62°19′06″ E 53.47 feet;
335. N 42°17′15″ E 75.16 feet;
336. N 42°33′08″ E 98.01 feet;
337. N 14°53′12″ E 16.50 feet;
338. N 05°14′15″ W 25.31 feet;
339. N 39°32′31″ E 98.80 feet;
340. N 04°53′40″ W 145.92 feet;
341. N 09°04′54″ E 362.65 feet;
342. N 14°50′01″ E 304.17 feet;
343. N 01°28′58″ E 71.48 feet;
344. N 02°08′33″ E 176.53 feet;
345. N 01°57′51″ W 319.75 feet;
346. N 01°20′24″ W 243.11 feet;
347. N 09°08′02″ E 139.88 feet;
348. N 13°07′32″ W 209.36 feet;
349. N 06°26′13″ W 175.51 feet;
350. N 05°37′45″ W 293.41 feet;
351. N 06°34′59″ W 217.59 feet;
352. N 07°47′48″ W 290.66 feet;
353. N 10°41′30″ W 267.70 feet;
354. N 04°47′01″ W 72.08 feet;
355. N 14°28′47″ W 234.20 feet;
356. N 00°19′43″ W 116.62 feet;
357. N 07°44′46″ W 279.97 feet;
358. N 11°32′18″ W 356.71 feet;
359. N 11°07′49″ W 213.28 feet;
360. N 14°30′09″ W 272.42 feet;

361. N 06°36′37″ W 286.80 feet;
362. N 08°28′38″ W 238.45 feet;
363. N 17°03′40″ W 151.67 feet;
364. N 09°18′29″ W 342.55 feet;
365. N 14°40′23″ W 256.29 feet;
366. N 14°18′03″ W 363.43 feet;
367. N 11°45′38″ E 206.67 feet;
368. N 41°54′52″ E 321.85 feet;
369. N 63°25′44″ E 273.18 feet;
370. S 74°04′12″ E 474.64 feet;
371. N 88°03′52″ E 416.71 feet;
372. S 66°20′00″ E 572.97 feet;
373. S 80°24′37″ E 222.10 feet;
374. S 89°46′40″ E 349.53 feet;
375. N 82°26′19″ E 391.23 feet;
376. N 66°00′59″ E 497.08 feet;
377. N 58°38′57″ E 276.46 feet

to a standard California State Lands Commission brass tablet set in concrete stamped "N–MID–CAL 1981" having California Coordinate System, Zone 6 coordinates x=2,472,838.61 feet and y=432,666.01 feet, said tablet being located on the westerly boundary of the parcels of land taken by condemnation in *United States* v. *243.25 Acres of Land*, Civil No. 3505–SD–Smith (S. D. Cal. 1973) and *United States* v. *67.57 Acres of Land*, Civil No. 5925–Phx–Craig (D. Ariz. 1972); thence leaving said centerline of the former channel,

378. Southwesterly 279.92 feet along said westerly boundary, being a fixed and limiting boundary of the herein described parcel, on the arc of a curve, concave westerly, having a radius of 15,350 feet, to a point on said curve subtended by a chord which bears S 07°53′20″ W 279.92 feet, said point being monumented with a standard California State Lands Commission brass tablet set in concrete, stamped "N–LB ARIZ 1981", having California Coordinate System, Zone 6 coordinates of x=2,472,800.19 feet and y=432,388.74 feet, from which California State Lands Commission Monument "PI–14" bears N 18°47′54″ E 1151.11 feet, as said monument is shown on said map, also from which said brass tablet, the section corner common to Sections 11, 12, 13 and 14, T1S, R24W, G&SRM, as shown on the United States Bureau of Land Management plat, accepted August, 1961, bears N 71°55′49″ E 1611.90 feet; thence downstream along a fixed and limiting boundary of the herein described parcel, the following 451 courses:

379. S 58°45′19″ W 85.58 feet;
380. S 67°38′56″ W 249.89 feet;
381. S 63°43′57″ W 155.84 feet;
382. S 72°16′06″ W 184.20 feet;
383. S 78°34′43″ W 146.14 feet;
384. S 83°53′41″ W 329.27 feet;
385. S 88°37′43″ W 388.16 feet;
386. N 86°25′25″ W 240.47 feet;
387. N 76°32′50″ W 213.20 feet;
388. N 68°55′05″ W 287.46 feet;
389. N 78°03′34″ W 361.78 feet;
390. N 69°59′22″ W 469.15 feet;
391. S 72°10′47″ W 102.57 feet;
392. S 47°23′09″ W 101.91 feet;
393. S 25°37′19″ W 108.69 feet;
394. S 13°06′59″ W 105.76 feet;
395. S 03°21′59″ W 102.18 feet;
396. S 03°38′10″ E 299.60 feet;
397. S 04°11′06″ E 205.55 feet;
398. S 12°23′07″ E 303.05 feet;
399. S 17°03′40″ E 303.35 feet;
400. S 12°44′31″ E 204.03 feet;
401. S 04°29′08″ E 249.21 feet;

402. S 16°06′43″ E 236.71 feet;
403. S 12°58′58″ E 210.41 feet;
404. S 12°25′06″ E 194.47 feet;
405. S 10°36′11″ E 198.69 feet;
406. S 02°21′08″ E 229.51 feet;
407. S 00°19′45″ E 233.24 feet;
408. S 24°35′43″ E 164.99 feet;
409. S 04°46′58″ E 144.16 feet;
410. S 15°05′56″ E 182.16 feet;
411. S 08°41′35″ E 284.96 feet;
412. S 09°40′02″ E 222.06 feet;
413. S 08°33′33″ E 174.90 feet;
414. S 06°47′07″ E 173.17 feet;
415. S 21°34′13″ E 97.08 feet;
416. S 09°32′18″ E 99.27 feet;
417. S 24°41′06″ E 123.51 feet;
418. S 25°41′09″ E 101.42 feet;
419. S 02°05′30″ W 53.98 feet;
420. S 15°33′52″ W 92.95 feet;
421. S 09°09′15″ E 82.85 feet;
422. S 08°35′15″ E 141.17 feet;
423. S 13°23′46″ E 119.17 feet;
424. S 10°02′38″ E 108.20 feet;
425. S 04°57′17″ E 119.26 feet;
426. S 04°37′53″ W 165.58 feet;
427. S 01°28′59″ W 142.97 feet;
428. S 05°49′59″ E 252.68 feet;
429. S 02°44′42″ W 292.34 feet;
430. S 08°15′47″ W 182.68 feet;
431. S 27°44′21″ E 221.17 feet;
432. S 08°46′04″ E 26.18 feet;
433. S 05°13′42″ E 50.59 feet;
434. S 14°50′39″ W 33.02 feet;
435. S 40°43′36″ W 53.52 feet;
436. S 52°19′09″ W 120.67 feet;
437. S 62°19′06″ W 106.94 feet;
438. S 41°26′32″ W 8.20 feet;
439. S 17°30′03″ W 132.09 feet;
440. S 02°00′03″ E 55.56 feet;
441. S 19°15′22″ E 191.76 feet;
442. S 11°53′15″ E 173.16 feet;
443. S 02°12′11″ E 241.66 feet;
444. S 05°28′02″ W 217.06 feet;
445. S 23°06′41″ W 180.17 feet;
446. S 37°57′30″ W 148.76 feet;
447. S 48°45′25″ W 164.55 feet;
448. S 59°11′34″ W 325.33 feet;
449. S 42°48′13″ W 21.79 feet;
450. S 25°17′54″ W 317.81 feet;
451. S 16°55′02″ W 342.44 feet;
452. S 32°06′35″ W 23.87 feet;
453. S 49°38′48″ W 276.68 feet;
454. S 60°19′46″ W 103.98 feet;
455. S 79°56′36″ W 63.64 feet;
456. S 44°01′44″ W 74.60 feet;
457. S 20°55′28″ W 109.20 feet;
458. S 03°28′57″ E 140.43 feet;
459. S 06°05′54″ E 345.74 feet;
460. S 06°05′48″ E 345.75 feet;
461. S 32°34′17″ W 168.48 feet;
462. S 17°35′41″ W 266.14 feet;
463. S 30°06′42″ W 61.23 feet;
464. S 41°41′34″ W 226.03 feet;
465. S 44°35′14″ W 145.30 feet;
466. S 40°34′00″ W 111.05 feet;
467. S 40°02′55″ W 123.14 feet;
468. S 46°00′59″ W 122.79 feet;
469. S 44°26′16″ W 108.84 feet;
470. S 52°56′12″ W 268.39 feet;
471. S 56°42′26″ W 131.24 feet;
472. S 55°42′54″ W 168.79 feet;
473. S 56°00′39″ W 106.77 feet;
474. S 57°12′12″ W 100.69 feet;
475. S 53°12′11″ W 102.19 feet;
476. S 63°09′46″ W 73.41 feet;
477. N 86°34′07″ W 93.90 feet;
478. N 76°12′12″ W 96.24 feet;
479. S 89°11′29″ W 113.37 feet;
480. S 88°17′58″ W 70.09 feet;
481. S 69°16′43″ W 95.27 feet;
482. S 57°49′20″ W 110.66 feet;
483. S 53°52′23″ W 105.21 feet;
484. S 59°36′59″ W 85.89 feet;
485. S 39°47′16″ W 66.47 feet;
486. S 28°33′56″ W 87.75 feet;
487. S 19°05′09″ W 100.22 feet;

488. S 15°01′54″ W 240.95 feet;
489. S 10°51′19″ W 104.77 feet;
490. S 11°10′21″ W 138.06 feet;
491. S 14°35′32″ W 117.73 feet;
492. S 17°19′33″ W 118.13 feet;
493. S 27°00′27″ W 66.02 feet;
494. S 28°24′12″ E 20.08 feet;
495. N 42°15′47″ E 72.71 feet;
496. N 27°42′21″ E 89.63 feet;
497. N 36°57′39″ E 64.31 feet;
498. S 73°25′21″ E 9.46 feet;
499. S 23°44′15″ W 68.54 feet;
500. S 14°55′55″ W 62.83 feet;
501. S 84°04′41″ E 50.69 feet;
502. N 39°32′11″ E 43.59 feet;
503. N 38°42′57″ E 75.00 feet;
504. N 43°37′10″ E 75.44 feet;
505. S 80°27′48″ E 36.76 feet;
506. S 16°08′24″ W 54.18 feet;
507. S 39°09′54″ W 55.09 feet;
508. S 55°13′47″ W 240.09 feet;
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512. S 56°24′25″ W 134.18 feet;
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519. S 53°59′07″ W 172.04 feet;
520. S 81°05′34″ W 63.29 feet;
521. S 43°10′48″ W 160.09 feet;
522. S 42°26′51″ W 179.10 feet;
523. S 46°56′20″ W 183.28 feet;
524. S 56°40′44″ W 161.91 feet;
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526. S 41°35′43″ W 305.77 feet;
527. S 36°14′42″ W 134.77 feet;
528. S 10°29′41″ W 125.84 feet;
529. S 11°13′27″ W 129.77 feet;
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536. S 32°55′17″ E 222.86 feet;
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538. S 32°55′29″ E 259.90 feet;
539. S 35°14′17″ E 189.13 feet;
540. S 28°00′33″ E 180.47 feet;
541. S 26°27′16″ E 208.25 feet;
542. S 86°56′59″ E 40.22 feet;
543. S 49°24′43″ E 46.88 feet;
544. S 04°48′27″ E 246.76 feet;
545. S 16°25′25″ E 122.09 feet;
546. S 55°46′43″ E 36.79 feet;
547. S 27°26′13″ E 295.40 feet;
548. S 28°59′05″ E 221.60 feet;
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564. S 50°01′34″ E 282.89 feet;
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582. S 81°30′12″ E 195.47 feet;
583. S 73°38′32″ E 249.36 feet;
584. S 80°08′31″ E 178.26 feet;
585. S 75°15′19″ E 328.39 feet;
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588. S 84°50′48″ E 129.59 feet;
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591. S 81°48′54″ E 372.97 feet;
592. S 79°11′16″ E 380.14 feet;
593. S 79°25′58″ E 134.03 feet;
594. S 24°53′23″ E 22.03 feet;
595. S 85°54′52″ E 72.28 feet;
596. N 82°15′33″ E 50.78 feet;
597. S 71°40′20″ E 86.15 feet;
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599. S 66°03′44″ E 125.08 feet;
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617. S 67°34′57″ E 239.54 feet;
618. S 81°18′34″ E 87.76 feet;
619. S 70°20′55″ E 250.11 feet;
620. S 66°24′51″ E 140.26 feet;
621. S 62°57′51″ E 130.66 feet;
622. S 72°52′00″ E 257.10 feet;
623. S 63°05′55″ E 128.72 feet;
624. S 71°10′45″ E 229.60 feet;
625. S 62°58′43″ E 104.42 feet;
626. S 69°05′40″ E 234.01 feet;
627. S 65°04′36″ E 136.12 feet;
628. S 59°05′12″ E 138.55 feet;
629. S 67°56′20″ E 145.05 feet;
630. S 64°55′40″ E 102.65 feet;
631. S 62°11′03″ E 135.63 feet;
632. S 65°23′19″ E 127.50 feet;
633. S 56°52′07″ E 125.46 feet;
634. S 50°59′31″ E 225.36 feet;
635. S 55°08′58″ E 105.86 feet;
636. S 67°01′55″ E 118.11 feet;
637. S 60°57′13″ E 150.40 feet;
638. S 48°49′30″ E 84.48 feet;
639. S 65°35′56″ E 142.48 feet;
640. N 89°23′45″ E 41.73 feet;
641. S 57°51′45″ E 125.91 feet;
642. S 56°29′17″ E 262.48 feet;
643. S 59°40′11″ E 156.98 feet;
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647. S 52°28′46″ E 204.68 feet;
648. S 61°12′11″ E 181.21 feet;
649. S 37°39′48″ E 66.00 feet;
650. S 49°08′11″ E 92.35 feet;
651. S 58°48′24″ E 90.78 feet;
652. S 38°03′31″ E 92.27 feet;
653. S 43°43′07″ E 88.54 feet;
654. S 51°32′30″ E 82.61 feet;
655. S 41°00′07″ E 99.90 feet;
656. S 46°08′39″ E 210.71 feet;
657. S 51°32′03″ E 97.74 feet;
658. S 40°54′29″ E 214.05 feet;
659. S 02°47′21″ W 38.23 feet;

660. S 46°39′58″ E 84.63 feet;
661. S 28°51′47″ E 212.26 feet;
662. S 39°10′09″ E 69.39 feet;
663. S 26°39′24″ E 148.20 feet;
664. S 20°17′51″ E 50.30 feet;
665. S 36°10′31″ W 25.90 feet;
666. S 30°25′15″ E 27.33 feet;
667. N 67°09′38″ E 23.47 feet;
668. S 34°19′33″ E 78.49 feet;
669. S 27°46′57″ E 104.39 feet;
670. S 22°20′57″ E 205.31 feet;
671. S 20°34′38″ E 212.08 feet;
672. S 23°12′41″ E 100.53 feet;
673. S 10°39′41″ E 92.86 feet;
674. S 13°51′46″ E 181.10 feet;
675. S 26°25′11″ E 100.51 feet;
676. S 28°48′18″ E 266.84 feet;
677. S 26°24′33″ E 289.20 feet;
678. S 30°55′21″ E 250.10 feet;
679. S 30°00′26″ E 294.96 feet;
680. S 27°05′45″ E 298.90 feet;
681. S 26°36′05″ E 246.59 feet;
682. S 24°04′14″ E 129.16 feet;
683. S 18°24′10″ E 263.99 feet;
684. S 19°38′55″ E 108.55 feet;
685. S 11°09′29″ W 14.06 feet;
686. S 21°46′47″ E 230.73 feet;
687. S 27°14′52″ E 76.93 feet;
688. S 09°59′07″ E 172.96 feet;
689. S 02°16′55″ W 83.13 feet;
690. S 14°23′28″ E 251.35 feet;
691. S 08°12′25″ E 193.98 feet;
692. S 07°37′21″ E 115.12 feet;
693. S 03°08′44″ E 121.00 feet;
694. S 07°49′00″ W 184.40 feet;
695. S 11°40′00″ W 274.65 feet;
696. S 18°06′52″ W 176.99 feet;
697. S 25°11′15″ W 223.41 feet;
698. S 01°37′33″ W 50.40 feet;
699. S 76°11′04″ W 28.35 feet;
700. S 15°18′44″ W 45.74 feet;
701. S 44°01′15″ W 77.38 feet;
702. S 33°20′32″ W 198.24 feet;
703. S 09°45′36″ W 31.97 feet;
704. S 67°36′06″ W 56.14 feet;
705. S 30°28′52″ W 37.06 feet;
706. S 59°19′13″ W 148.03 feet;
707. S 89°59′46″ W 146.03 feet;
708. S 56°07′09″ W 190.70 feet;
709. S 76°39′12″ W 70.74 feet;
710. S 64°10′36″ W 100.87 feet;
711. S 71°59′42″ W 265.87 feet;
712. S 68°05′09″ W 92.39 feet;
713. S 49°57′27″ W 34.37 feet;
714. S 68°45′32″ W 110.52 feet;
715. S 51°21′10″ W 225.77 feet;
716. S 46°51′11″ W 142.59 feet;
717. S 40°21′42″ W 124.78 feet;
718. S 42°48′55″ W 102.20 feet;
719. S 53°23′18″ W 129.18 feet;
720. S 43°39′06″ W 147.26 feet;
721. S 42°32′22″ W 148.07 feet;
722. S 46°14′58″ W 232.20 feet;
723. S 38°16′09″ W 121.21 feet;
724. S 28°33′33″ W 51.79 feet;
725. S 55°17′44″ W 105.12 feet;
726. S 43°08′25″ W 192.62 feet;
727. S 42°58′34″ W 74.89 feet;
728. S 25°27′32″ W 71.81 feet;
729. S 55°28′32″ W 125.31 feet;
730. S 53°23′31″ W 107.61 feet;
731. S 47°49′50″ W 99.52 feet;
732. S 61°59′40″ W 100.69 feet;
733. S 54°25′51″ W 181.68 feet;
734. S 76°32′42″ W 24.63 feet;
735. S 48°29′48″ W 233.50 feet;
736. S 86°22′11″ W 43.75 feet;
737. S 54°55′02″ W 102.72 feet;
738. S 49°59′24″ W 112.67 feet;
739. S 53°07′51″ W 160.74 feet;
740. S 60°24′15″ W 81.03 feet;
741. S 45°44′09″ W 50.10 feet;
742. S 63°18′46″ W 48.23 feet;
743. S 77°17′01″ W 29.80 feet;
744. S 56°12′52″ W 198.12 feet;
745. S 63°10′28″ W 110.12 feet;

746. S 57°00′17″ W 106.34 feet;
747. S 69°35′07″ W 113.41 feet;
748. S 64°34′41″ W 114.10 feet;
749. S 56°22′36″ W 124.00 feet;
750. S 48°21′41″ W 331.65 feet;
751. S 34°59′21″ W 214.69 feet;
752. S 29°28′22″ W 117.25 feet;
753. S 24°56′24″ W 83.26 feet;
754. S 18°48′55″ W 77.17 feet;
755. S 10°42′08″ E 162.73 feet;
756. S 22°47′29″ E 164.14 feet;
757. S 06°41′13″ W 24.99 feet;
758. S 21°01′39″ E 166.38 feet;
759. S 65°05′14″ E 18.30 feet;
760. S 19°32′21″ E 62.85 feet;
761. S 36°38′05″ E 46.76 feet;
762. S 08°34′36″ E 104.14 feet;
763. S 29°56′22″ E 74.54 feet;
764. S 36°38′32″ E 106.20 feet;
765. S 41°28′29″ E 94.29 feet;
766. S 45°24′24″ E 247.11 feet;
767. S 36°11′07″ E 118.17 feet;
768. S 22°29′31″ E 56.86 feet;
769. S 36°37′24″ E 132.95 feet;
770. S 32°53′13″ E 228.74 feet;
771. S 25°33′10″ E 123.78 feet;
772. S 36°05′29″ E 305.24 feet;
773. S 38°58′11″ E 343.15 feet;
774. S 37°14′51″ E 283.75 feet;
775. S 40°41′02″ E 253.31 feet;
776. S 44°23′34″ E 320.92 feet;
777. S 51°39′29″ E 47.02 feet;
778. S 38°17′13″ E 189.64 feet;
779. S 29°41′54″ E 244.71 feet;
780. S 67°34′27″ E 25.22 feet;
781. S 31°44′33″ E 126.08 feet;
782. S 48°31′24″ E 48.21 feet;
783. S 07°36′37″ W 19.48 feet;
784. S 33°21′25″ E 208.40 feet;
785. S 26°22′29″ E 222.13 feet;
786. S 35°15′47″ E 216.91 feet;
787. S 77°17′17″ E 27.49 feet;
788. S 17°56′13″ E 61.86 feet;
789. S 37°08′35″ E 66.73 feet;
790. S 29°10′16″ E 110.25 feet;
791. S 34°06′21″ E 243.12 feet;
792. S 40°20′23″ E 142.82 feet;
793. S 30°43′37″ E 107.41 feet;
794. S 40°38′33″ E 322.38 feet;
795. S 01°33′17″ E 23.22 feet;
796. S 37°48′53″ E 271.36 feet;
797. S 36°17′19″ E 318.41 feet;
798. S 34°48′10″ E 266.05 feet;
799. S 38°38′40″ E 236.92 feet;
800. S 42°56′22″ E 324.31 feet;
801. S 42°15′21″ E 262.89 feet;
802. S 41°43′45″ E 284.81 feet;
803. S 39°24′11″ E 167.70 feet;
804. S 32°32′27″ E 82.56 feet;
805. S 41°59′11″ E 132.75 feet;
806. S 32°47′44″ E 331.64 feet;
807. S 34°13′24″ E 306.32 feet;
808. S 25°48′55″ E 127.47 feet;
809. S 24°26′47″ E 226.80 feet;
810. S 18°52′19″ E 225.90 feet;
811. S 34°24′10″ E 53.06 feet;
812. S 06°14′11″ E 64.07 feet;
813. S 23°02′28″ E 110.30 feet;
814. S 19°41′29″ E 204.51 feet;
815. S 04°50′10″ W 49.82 feet;
816. S 38°56′27″ W 64.31 feet;
817. S 25°16′25″ W 57.74 feet;
818. S 43°14′24″ W 54.57 feet;
819. N 65°45′19″ W 29.05 feet;
820. S 23°32′11″ W 53.92 feet;
821. S 00°16′24″ E 71.24 feet;
822. S 67°44′27″ W 30.91 feet;
823. S 35°24′30″ W 78.34 feet;
824. S 18°27′07″ W 127.83 feet;
825. S 08°21′04″ W 78.49 feet;
826. S 08°01′19″ E 45.65 feet;
827. S 21°57′03″ E 56.20 feet;
828. S 25°48′52″ W 67.24 feet;
829. S 13°41′05″ W 89.36 feet to a standard California State Lands

Commission brass tablet set in concrete stamped "S–LB–ARIZ LB–1002–1981" having California Coordinate System, Zone 6 coordinates of x=2,482,687.70 feet and y=387,-254.91 feet, from which United States Water and Power Resources Service (formerly United States Bureau of Reclamation) Station RUIN bears N 45°17′59″ E 524.27 feet; thence, the following two courses:

830. S 54°13′42″ W 37.57 feet;

831. S 00°13′08″ E 60.22 feet to a point having California Coordinate System, Zone 6 coordinates of x=2,482,657.45 feet and y=387,-172.73 feet as said point is shown on the Davis Lake Area Project Administrative Maps, herein before described; thence,

832. N 77°38′10″ W 213.25 feet to a point on the centerline of the former channel of the Colorado River, said point also being the point of beginning of the herein described parcel of land.

Bearings and distances in the above description are based on the California Coordinate System, Zone 6.

MARYLAND ET AL. *v.* LOUISIANA

ON BILL OF COMPLAINT

No. 83, Orig. Decided May 26, 1981—Decree entered June 15, 1981

Decree entered.

Opinion reported: 451 U. S. 725.

DECREE

This cause having come on to be heard on the exceptions to the Reports of the Special Master dated May 14, 1980, and September 15, 1980, and having been argued by counsel and this Court having stated its conclusions in its opinion announced May 26, 1981, 451 U. S. 725, and having considered the positions of the respective parties as to the terms of this decree, IT IS ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The exceptions of the defendant State of Louisiana to the Report of the Special Master dated May 14, 1980, are overruled and accordingly:

(a) the motions of the State of New Jersey, the United States and the Federal Energy Regulatory Commission, and Columbia Gas Transmission Corporation et al., for leave to intervene as party plaintiffs are granted; and

(b) the motion of Associated Gas Distributors for leave to file a brief as *amicus curiae* is granted.

2. The exceptions of the defendant State of Louisiana to the Report of the Special Master dated September 15, 1980, are overruled, the plaintiff's exceptions are sustained to the extent indicated in this Court's opinion, and accordingly:

(a) the motion of the defendant State of Louisiana to dismiss the bill of complaint is denied; and

(b) the motion of the plaintiff States for judgment on the pleadings is granted in part.

3. The motion of the plaintiff States for entry of decree and the motion of the Solicitor General for entry of decree

are granted. The motion of the defendant State of Louisiana for entry of decree is denied.

4. Section 1 of the Louisiana First Use Tax Act, La. Rev. Stat. Ann. § 47:1303C (West Supp. 1981), violates the Supremacy Clause and the Louisiana First Use Tax Act, La. Rev. Stat. Ann. §§ 47:1301–47:1307 (West Supp. 1981), is unconstitutional under the Commerce Clause.

5. Effective with the date of entry of this decree, the defendant State of Louisiana, its officers, agents, and employees are permanently enjoined and prohibited from collecting the Louisiana First Use Tax.

6. Within thirty (30) days after the entry of this decree, the defendant State of Louisiana shall:

(a) render to the plaintiffs and file with the Court a true, full, accurate, and appropriate account of any and all revenues collected pursuant to the First Use Tax Act and of the interest earned by the defendant as a result of its investment of these revenues and the interest earned thereon; and

(b) refund to the taxpayers any and all revenues collected pursuant to the First Use Tax together with any and all interest earned as a result of its investment of these revenues and the interest earned thereon, but to the extent that the First Use Tax revenues and the interest earned thereon have been invested by the defendant State of Louisiana in interest-bearing securities, the defendant State of Louisiana shall transfer to the taxpayers the proceeds of principal and interest from such securities as each of such securities matures.

7. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to this decree or to effectuate the rights of the parties in the premises.

JUSTICE POWELL took no part in the consideration or decision of these motions or this decree.

CONNECTICUT BOARD OF PARDONS ET AL. *v.* DUMSCHAT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 79–1997. Argued February 24, 1981—Decided June 17, 1981

After several applications by respondent Dumschat, a life inmate in a Connecticut state prison, for commutation of his life sentence had been rejected by the Connecticut Board of Pardons without explanation, he sued the Board in Federal District Court under 42 U. S. C. § 1983, seeking a declaratory judgment that the Board's failure to provide him with a written statement of reasons for denying commutation violated his rights under the Due Process Clause of the Fourteenth Amendment. Relying chiefly on the fact that the Board had granted approximately three-fourths of all applications for commutation of life sentences, the District Court, after allowing other inmates (also respondents) to intervene and certifying the suit as a class action, held that all prisoners serving life sentences in Connecticut state prisons have a constitutionally protected "entitlement" to a statement of reasons why commutation is not granted. The Court of Appeals affirmed, and then, after its judgment had been vacated by this Court and the case had been remanded for reconsideration in light of *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, held that the overwhelming likelihood that Connecticut life inmates will be pardoned and released before they complete their minimum terms gave them a constitutionally protected liberty interest in pardon proceedings, and that under *Greenholtz* a statement of reasons for denying commutation was constitutionally necessary under the Due Process Clause.

Held: The power vested in the Connecticut Board of Pardons to commute sentences conferred no rights on respondents beyond the right to seek commutation. Pp. 463–467.

(a) Far from supporting an "entitlement," *Greenholtz*, which rejected the claim that a constitutional entitlement to release from a valid prison sentence exists independently of a right explicitly conferred by the State, compels the conclusion that an inmate has "no constitutional or inherent right" to commutation of his life sentence. In terms of the Due Process Clause, a Connecticut felon's expectation that a lawfully imposed sentence will be commuted or that he will be pardoned is no

more substantial than an inmate's expectation, for example, that he will not be transferred to another prison; it is simply a unilateral hope. A constitutional entitlement cannot "be created—as if by estoppel—merely because a wholly and *expressly* discretionary state privilege has been granted generally in the past." *Leis* v. *Flynt*, 439 U. S. 438, 444, n. 5. No matter how frequently a particular form of clemency has been granted, the statistical probabilities generate no constitutional protections. Pp. 463–465.

(b) In contrast to the unique Nebraska parole statute which was applied in *Greenholtz* and which created a right to parole unless certain findings were made, the mere existence of a power to commute under the Connecticut commutation statute—which imposes no limit on what procedure is to be followed, what evidence may be considered, or what criteria are to be applied by the Board of Pardons—and the granting of commutation to many inmates, create no right or "entitlement." Pp. 466–467.

618 F. 2d 216, reversed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., *post*, p. 467, and WHITE, J., *post*, p. 467, filed concurring opinions. STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 468.

Stephen J. O'Neill, Assistant Attorney General of Connecticut, argued the cause for petitioners. With him on the brief was *Carl R. Ajello*, Attorney General.

Stephen Wizner argued the cause for respondents. With him on the brief were *Dennis E. Curtis* and *John L. Pottenger, Jr.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented is whether the fact that the Connecticut Board of Pardons has granted approximately three-fourths of the applications for commutation of life sentences creates a constitutional "liberty interest" or "entitlement" in life-term inmates so as to require that Board to explain its reasons for denial of an application for commutation.

I

In 1964, respondent Dumschat was sentenced to life imprisonment for murder. Under state law, he was not eligible for parole until December 1983.[1] The Connecticut Board of Pardons is empowered to commute the sentences of life inmates by reducing the minimum prison term,[2] and such a commutation accelerates eligibility for parole.[3] The authority of the Board of Pardons derives from Conn. Gen. Stat. § 18–26 (1981), which provides in pertinent part:

> "(a) Jurisdiction over the granting of, and the authority to grant, commutations of punishment or releases, conditioned or absolute, in the case of any person convicted of any offense against the state and commutations from the penalty of death shall be vested in the board of pardons.
>
> "(b) Said board shall have authority to grant pardons, conditioned or absolute, for any offense against the state at any time after the imposition and before or after the service of any sentence."

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[1] A Connecticut inmate serving a life sentence, imposed before 1971, that does not have a specified minimum term must serve a minimum of 25 years in prison, less a maximum of 5 years' good-time credits, unless the Board of Pardons commutes the sentence. See Conn. Gen. Stat. § 54–125 (1981).

Effective in 1971, the sentencing judge must specify a minimum term, which may be as low as 10 years or as high as 25 years. Conn. Gen. Stat. § 53a–35 (c)(1) (1981).

[2] The Board of Pardons also has the power to grant immediate release in the form of an absolute pardon, but according to the District Court, that power has not been employed in recent history. 432 F. Supp. 1310, 1313 (Conn. 1977).

The District Court noted that by virtue of this statute, Connecticut "stands outside the traditional scheme of clemency through application to the state's chief executive." The Governor of Connecticut has only the power to grant temporary reprieves. *Id.*, at 1312.

[3] Parole determinations are made by the Board of Parole, a separate body. This case does not involve parole procedure; it involves only denials of commutations.

On several occasions prior to the filing of this suit in February 1976, Dumschat applied for a commutation of his sentence. The Board rejected each application without explanation. Dumschat then sued the Board under 42 U. S. C. § 1983, seeking a declaratory judgment that the Board's failure to provide him with a written statement of reasons for denying commutation violated his rights guaranteed by the Due Process Clause of the Fourteenth Amendment.

After hearing testimony from officials of the Board of Pardons and the Board of Parole, the District Court concluded (a) that Dumschat had a constitutionally protected liberty entitlement in the pardon process, and (b) that his due process rights had been violated when the Board of Pardons failed to give "a written statement of reasons and facts relied on" in denying commutation. 432 F. Supp. 1310, 1315 (1977). The court relied chiefly on a showing that "at least 75 percent of all lifers received some favorable action from the pardon board prior to completing their minimum sentences" and that virtually all of the pardoned inmates were promptly paroled.[4] *Id.*, at 1314. In response to postjudgment motions, the District Court allowed other life inmates to intervene, certified the suit as a class action, and heard additional evidence.[5]

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[4] Of the inmates whose minimum sentences have been commuted by the Board of Pardons, the Board of Parole has paroled approximately 90% during the first year of eligibility, and all have been paroled within a few years. App. 33, 39. The Chairman of the Board of Parole testified that "no more than 10 or 15 per cent" of Connecticut's life inmates serve their 20-year minimum terms. *Id.*, at 31.

[5] On the day that the District Court entered its declaratory judgment, the Board commuted Dumschat's sentence to time served and granted him immediate release. The Board then moved to dismiss the suit as moot. The District Court denied the Board's motion and permitted three other inmates to intervene. Those inmates were serving life terms for murder and had been denied commutation without statements of reasons. Two of them are still serving their sentences. According to respondents, there are approximately 35 persons in the certified class, which consists of all

The court held that all prisoners serving life sentences in Connecticut state prisons have a constitutionally protected expectancy of commutation and therefore that they have a right to a statement of reasons when commutation is not granted. The Court of Appeals affirmed. 593 F. 2d 165 (CA2 1979). A petition for a writ of certiorari was filed, and we vacated and remanded for reconsideration in light of *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1 (1979). 442 U. S. 926 (1979).

On remand, the Court of Appeals reaffirmed its original decision, 618 F. 2d 216 (CA2 1980), stating:

> "In marked contrast [to the Nebraska statute considered in *Greenholtz*], Connecticut's pardons statute contains neither a presumption in favor of pardon nor a list of factors to be considered by the Board of Pardons. Instead, the statute grants the board unfettered discretion in the exercise of its power. The statute offers only the 'mere hope' of pardon; it does not create a legitimate expectation of freedom and therefore does not implicate due process." *Id.*, at 219 (citation omitted).

The Court of Appeals also noted that the District Court's holding that the mere possibility of a pardon creates a constitutionally cognizable liberty interest or entitlement was "no longer tenable" in light of *Greenholtz*. 618 F. 2d, at 221; see 442 U. S., at 8–11. However, the Court of Appeals then proceeded to conclude that "[t]he overwhelming likelihood that Connecticut life inmates will be pardoned and released before they complete their minimum terms gives them a constitutionally protected liberty interest in pardon pro-

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"inmates of the State of Connecticut who are currently serving sentences of life imprisonment [without court-imposed minimum terms] and who have been, or who will be, denied pardons during their current terms of incarceration" by the Board of Pardons. App. to Pet. for Cert. 21a; Brief for Petitioners ii; Tr. of Oral Arg. 36; see n. 1, *supra*.

ceedings." 618 F. 2d, at 220. The Court of Appeals also understood our opinion in *Greenholtz* to hold that under the Due Process Clause, a brief statement of reasons is "not only constitutionally sufficient but also constitutionally *necessary*." [6] 618 F. 2d, at 222. On that reading of *Greenholtz*, the case was remanded to the District Court for a determination of "how many years life inmates must serve before the probability of pardon becomes so significant as to give rise to a protected liberty interest." [7]

II

A

A state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right. See *Meachum* v. *Fano*, 427 U. S. 215, 226 (1976); *Wolff* v. *McDonnell*, 418 U. S. 539, 557 (1974). Plainly, however, the underlying right must have come into existence before it can trigger due process protection. See, *e. g.*, *Leis* v. *Flynt*, 439 U. S. 438, 442–443 (1979).

In *Greenholtz*, far from spelling out any judicially divined "entitlement," we did no more than apply the unique Nebraska statute. We rejected the claim that a constitutional entitlement to release from a valid prison sentence exists in-

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[6] In the cited passage of *Greenholtz*, we said: "The Nebraska [statutory] procedure affords an opportunity to be heard, and when parole is denied it informs the inmate in what respects he falls short of qualifying for parole; this affords the process that is due under these circumstances. The Constitution does not require more." 442 U. S., at 16.

[7] The Court of Appeals remarked that "[o]nly after this period has elapsed are lifers entitled to due process safeguards in the pardon process." 618 F. 2d, at 221. Because it believed that *every* life inmate who is denied a pardon is constitutionally entitled to a statement of reasons, the District Court did not make such a determination prior to the decision of the Court of Appeals that is now before us. *Id.*, at 220–221; see App. to Pet. for Cert. 25a.

dependently of a right explicitly conferred by the State. Our language in *Greenholtz* leaves no room for doubt:

> "There is *no constitutional or inherent right* of a convicted person to be conditionally released before the expiration of a valid sentence. The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right: '[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.'" 442 U. S., at 7 (emphasis supplied; citation omitted).

Greenholtz pointedly distinguished parole revocation and probation revocation cases,[8] noting that there is a "critical" difference between denial of a prisoner's request for initial release on parole and revocation of a parolee's conditional liberty. *Id.*, at 9–11, quoting, *inter alia*, Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1296 (1975). Unlike probation, pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.[9] Cf. *Meachum* v. *Fano*, *supra*, at 225.

A decision whether to commute a long-term sentence generally depends not simply on objective factfinding, but also on purely subjective evaluations and on predictions of future behavior by those entrusted with the decision. A commutation decision therefore shares some of the characteristics of a decision whether to grant parole. See *Greenholtz*, 442 U. S., at 9–10. Far from supporting an "entitlement," *Greenholtz* therefore compels the conclusion that an inmate has "no constitutional or inherent right" to commutation of his sentence.

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[8] *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973); *Morrissey* v. *Brewer*, 408 U. S. 471 (1972).

[9] Respondents have not raised any equal protection claim.

Respondents nevertheless contend that the Board's consistent practice of granting commutations to most life inmates is sufficient to create a protectible liberty interest. They argue:

> "[T]he State Board has created an unwritten common law of sentence commutation and parole acceleration for Connecticut life inmates. . . . In effect, there is an unspoken understanding between the State Board and inmates. The terms are simple: If the inmate cooperates with the State, the State will exercise its parole power on the inmate's behalf. Both the State and the inmate recognize those terms. Each expects the other to abide by them." Brief for Respondents 17–18.

This case does not involve parole, and respondents' argument wholly misconceives the nature of a decision by a state to commute the sentence of a convicted felon. The petition in each case is nothing more than an appeal for clemency. See *Schick* v. *Reed,* 419 U. S. 256, 260–266 (1974). In terms of the Due Process Clause, a Connecticut felon's expectation that a lawfully imposed sentence will be commuted or that he will be pardoned is no more substantial than an inmate's expectation, for example, that he will not be transferred to another prison;[10] it is simply a unilateral hope. *Greenholtz, supra,* at 11; see *Leis* v. *Flynt,* 439 U. S., at 443–444. A constitutional entitlement cannot "be created—as if by estoppel—merely because a wholly and *expressly* discretionary state privilege has been granted generously in the past." *Id.,* at 444, n. 5. No matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections; a contrary conclusion would trivialize the Constitution. The ground for a constitutional claim, if any, must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency.

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[10] See *Meachum* v. *Fano,* 427 U. S. 215, 228 (1976).

B

The Court of Appeals correctly recognized that Connecticut has conferred "unfettered discretion" on its Board of Pardons, but—paradoxically—then proceeded to fetter the Board with a halter of constitutional "entitlement." The statute imposes no limit on what procedure is to be followed, what evidence may be considered, or what criteria are to be applied by the Board. Respondents challenge the Board's procedure precisely because of "the absence of any apparent standards." Brief for Respondents 28. We agree that there are no explicit standards by way of statute, regulation, or otherwise.

This contrasts dramatically with the Nebraska statutory procedures in *Greenholtz*, which expressly mandated that the Nebraska Board of Parole "shall" order the inmate's release "unless" it decided that one of four specified reasons for denial was applicable. 442 U. S., at 11. The Connecticut commutation statute, having no definitions, no criteria, and no mandated "shalls," creates no analogous duty or constitutional entitlement.

It is clear that the requirement for articulating reasons for denial of parole in *Greenholtz* derived from unique mandates of the Nebraska statutes. Thus, although we noted that under the terms of the Nebraska statute, the inmates' expectancy of parole release "is entitled to some measure of constitutional protection," we emphasized that

> "this statute has unique structure and language and thus whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis." *Id.*, at 12.

Moreover, from the standpoint of a reasons requirement, there is a vast difference between a denial of parole—particularly on the facts of *Greenholtz*—and a state's refusal to commute a lawful sentence. When Nebraska statutes directed that inmates who are eligible for parole "shall" be released "unless"

a certain finding has been made, the statutes created a right. By contrast, the mere existence of a power to commute a lawfully imposed sentence, and the granting of commutations to many petitioners, create no right or "entitlement." A state cannot be required to explain its reasons for a decision when it is not required to act on prescribed grounds.

We hold that the power vested in the Connecticut Board of Pardons to commute sentences conferred no rights on respondents beyond the right to seek commutation.

Reversed.

JUSTICE BRENNAN, concurring.

I join the Court's opinion. Although respondents have demonstrated a statistical likelihood of obtaining the relief they request, that is not enough to create a protectible liberty interest. Rather, respondents must also show—by reference to statute, regulation, administrative practice, contractual arrangement or other mutual understanding—that particularized standards or criteria guide the State's decisionmakers. See *Leis* v. *Flynt*, 439 U. S. 438, 442 (1979); *Perry* v. *Sindermann*, 408 U. S. 593, 601 (1972); *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972). The *structure* of the State's decisionmaking process is thus as significant as the likely *result* of that process. Respondents have not shown that the Board is required to base its decisions on objective and defined criteria. As in *Meachum* v. *Fano*, 427 U. S. 215, 228 (1976), the decisionmaker can deny the requested relief for any constitutionally permissible reason or for no reason at all. Accordingly, I agree that respondents have no protectible liberty interest in a pardon.

JUSTICE WHITE, concurring.

I join the Court's opinion and write separately only to observe that neither *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), nor *Meachum* v. *Fano*, 427 U. S. 215 (1976), suggested that state law is the only source of a prisoner's liberty worthy of

federal constitutional protection. The opinion in *Wolff* v. *McDonnell* pointed out that although a prisoner's "rights may be diminished by the needs and exigencies of the institutional environment, [he] is not wholly stripped of constitutional protections when he is imprisoned for crime. . . . [He] may not be deprived of life, liberty or property without due process of law." 418 U. S., at 555–556. The issue in the case was the deprivation of the right to good-time credits, a right which was not guaranteed by the Federal Constitution but was a creation of state law. *Wolff* held that even such a liberty interest rooted in state law was entitled to constitutional protection.

Meachum v. *Fano* also pointed out that "the convicted felon does not forfeit all constitutional protections by reason of his conviction and confinement in prison. He retains a variety of important rights that the courts must be alert to protect." 427 U. S., at 225. The Court went on to hold that a state prisoner has no federal constitutional right protecting him against administrative transfers to another state prison. Neither did state law purport to create a liberty interest entitled to protection under the Fourteenth Amendment. Of course, JUSTICE STEVENS was in dissent in that case; but even there he recognized that the Court's opinion first addressed whether the right asserted was one of the liberty interests retained by convicted felons. We decided that it was not; he thought that it was. But neither *Wolff* nor *Meachum* is fairly characterized as suggesting that all liberty interests entitled to constitutional protection must be found in state law.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

"Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 18 (opinion of POWELL, J.).

The liberty that is worthy of constitutional protection is not merely "a statutory creation of the State," *Wolff* v. *McDonnell*, 418 U. S. 539, 558. Surely the Court stumbles when it states that liberty "must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency," *ante*, at 465, or when it implies that liberty has "its roots in state law," *Meachum* v. *Fano*, 427 U. S. 215, 226.

To some of us, it is "self-evident" that individual liberty has far deeper roots.[1] Moreover, the deprivation of liberty that follows conviction of a criminal offense is not total; the individual possesses a residuum of constitutionally protected liberty even while he is in the legal custody of the State.[2] The question this case presents is not whether these respondents are mere slaves, wholly divested of any constitutionally protected interest in liberty; rather, the question is whether the decision by the Connecticut Board of Pardons refusing to commute their life sentences constitutes a deprivation of liberty entitling respondents to the protection of the Due Process Clause.

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[1] "It is self-evident that all individuals possess a liberty interest in being free from physical restraint." *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 23 (MARSHALL, J., dissenting).

"If man were a creature of the State, the analysis would be correct. But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.

"I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations." *Meachum* v. *Fano*, 427 U. S. 215, 230 (STEVENS, J., dissenting).

[2] See *Meachum* v. *Fano*, *supra*, at 231–233.

The facile answer to that question is that the distinction between a refusal to grant freedom on the one hand and the imposition of a sentence or the revocation of a parole on the other forms the basis for a determination whether due process is implicated. Only the imposition of sentence or revocation of parole is obviously a deprivation of liberty. But in practice, as JUSTICE POWELL has explained, that distinction is far less satisfactory than it first appears.[3] In my judgment, it provides an insufficient answer to the question presented by this case because the distinction does not correctly evaluate the character of the deprivation of liberty that occurs when a person is convicted of a crime.

If the conviction were effective to terminate the defendant's liberty, he would thereafter retain no constitutional right to procedural safeguards against arbitrary action. The process of sentencing, parole release, parole revocation, and ultimate discharge could all be totally arbitrary. But no State asserts such total control over the convicted offender, and this Court has unequivocally held that the Constitution affords protection at different stages of the postconviction

[3] "The Court today, however, concludes that parole release and parole revocation 'are quite different,' because 'there is a . . . difference between losing what one has and not getting what one wants,' *ante*, at 9, 10. I am unpersuaded that this difference, if indeed it exists at all, is as significant as the Court implies. Release on parole marks the first time when the severe restrictions imposed on a prisoner's liberty by the prison regimen may be lifted, and his behavior in prison often is molded by his hope and expectation of securing parole at the earliest time permitted by law. Thus, the parole-release determination may be as important to the prisoner as some later, and generally unanticipated, parole-revocation decision. Moreover, whatever difference there may be in the subjective reactions of prisoners and parolees to release and revocation determinations is not dispositive. From the day that he is sentenced in a State with a parole system, a prisoner justifiably expects release on parole when he meets the standards of eligibility applicable within that system. This is true even if denial of release will be a less severe disappointment than revocation of parole once granted." *Greenholtz* v. *Nebraska Penal Inmates*, *supra*, at 19–20 (opinion of POWELL, J.).

process.[4] The basic reason the constitutional protection applies at these stages is that liberty itself survives to some extent and its deprivation is a continuous process rather than an isolated event.

This case involves the State of Connecticut's process for determining when a relatively small group of serious offenders will be released from custody. Routinely that process includes three determinations: the judge imposes a life sentence; the Board of Pardons in due course commutes that sentence; and finally the Board of Parole discharges the prisoner from custody. Each of these three decisions is a regular and critical component of the decisionmaking process employed by the State of Connecticut to determine the magnitude of its deprivation of the prisoner's liberty.[5] In my opinion the Due Process Clause applies to each step and denies the State the power to act arbitrarily.[6]

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[4] Thus the Court has held that the Due Process Clause protects the prisoner at the sentencing stage, *Mempa* v. *Rhay*, 389 U. S. 128, in probation revocation proceedings, *Gagnon* v. *Scarpelli*, 411 U. S. 778, and in parole revocation proceedings, *Morrissey* v. *Brewer*, 408 U. S. 471. Moreover, the Constitution has been applied to other issues affecting prisoners. See, *e. g.*, *Bounds* v. *Smith*, 430 U. S. 817 (right to assistance in the filing of legal papers); *Pell* v. *Procunier*, 417 U. S. 817, 822 (First Amendment rights); *Cruz* v. *Beto*, 405 U. S. 319 (right to practice religious faith); *Wilwording* v. *Swenson*, 404 U. S. 249 (right to file petition for writ of habeas corpus); *Cooper* v. *Pate*, 378 U. S. 546; (right to purchase religious materials); *Ex parte Hull*, 312 U. S. 546 (right to petition federal court for writ of habeas corpus). Cf. *Weems* v. *United States*, 217 U. S. 349 (sentence may violate Eighth Amendment).

[5] As the Court recognizes, *ante*, at 461, at least 75% of all life inmates receive some favorable action from the Board of Pardons. The Board of Parole paroles approximately 90% of these inmates during the first year after the Board of Pardons commutes their minimum sentences, and all are paroled within a few years. *Ante*, at 461, n. 4.

[6] The fact that the petitioner agency is given the title "Board of Pardons" does not, of course, make its work the equivalent of the exercise by a chief executive of the occasional totally discretionary power to grant pardons in isolated cases. As the record in this case makes clear, the petitioner com-

Whether the refusal to provide the inmates with a statement of reasons is a procedural shortcoming of constitutional magnitude is, admittedly, fairly debatable. Judges often decide difficult and important cases without explaining their reasons, and I would not suggest that they thereby commit constitutional error. But the ordinary litigant has other substantial procedural safeguards against arbitrary decisionmaking in the courtroom. The prison inmate has few such protections. Indeed, as in this case, often he is not even afforded the protection of written standards to govern the exercise of the powers of the Board of Pardons. His protection is somewhat analogous to that of the litigant in the earliest days of our common-law history. The judges then were guided by few written laws, but developed a meaningful set of rules by the process of case-by-case adjudication. Their explanations of why they decided cases as they did provided guideposts for future decisions and an assurance to litigants that like cases were being decided in a similar way. Many of us believe that those statements of reasons provided a better guarantee of justice than could possibly have been described in a code written in sufficient detail to be fit for Napoleon.

As JUSTICE MARSHALL has pointed out, "the obligation to justify a decision publicly would provide the assurance, critical to the appearance of fairness that the Board's decision is not capricious," see *Greenholtz*, 442 U. S., at 40 (dissenting opinion). I therefore believe the Court of Appeals correctly concluded that in this context a brief statement of reasons is an essential element of the process that is due these respondents.

Accordingly, I respectfully dissent.

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mutes sentences with roughly the same frequency that parole boards make parole release determinations.

HOWE *v.* SMITH, ATTORNEY GENERAL, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 80–5392. Argued April 28, 1981—Decided June 17, 1981

Title 18 U. S. C. § 5003 (a) authorizes the Attorney General to contract with a state "for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State," when the Director of the United States Bureau of Prisons certifies that proper and adequate federal "treatment facilities and personnel are available." Petitioner was convicted in a Vermont state court of first-degree murder arising out of the rape and strangulation of an elderly woman. Since Vermont had previously closed its only maximum-security prison, petitioner was assigned to a state prison having the capacity for short-term, but not long-term, incarceration of inmates with high security needs, and it was recommended because of the nature of his offense that he be transferred to a federal prison. A hearing was held before the Vermont Department of Corrections at which it was determined that petitioner was a high security risk, and, ultimately, under a contract between Vermont and the United States, petitioner was transferred to the federal prison system pursuant to § 5003 (a). Subsequently, petitioner filed an action in Federal District Court, challenging his transfer on the ground that the federal officials lacked statutory authority to accept custody. He claimed that § 5003 (a) requires federal authorities to make an individual determination that each state prisoner transferred to the federal system needs a particular specialized treatment program available in that system, and that no such determination had been made in his case. The District Court denied petitioner's request for relief, and the Court of Appeals affirmed.

Held: Section 5003 (a) authorizes a transfer of a state prisoner to the federal system such as occurred in this case. Pp. 479–487.

(a) Section 5003 (a)'s plain language authorizes contracts not simply for treatment, but also for custody, care, subsistence, education, and training of state prisoners in federal facilities. The requirement for certification by the Director of the Bureau of Prisons is simply a housekeeping measure designed to ensure that the federal system has the capacity to absorb the state prisoners. Nothing in § 5003 (a)'s language restricts or limits the use of federal prison facilities to those

state prisoners who are in need of some particular treatment. Pp. 480–482.

(b) Section 5003's legislative history reveals that it was enacted to deal with the simple and practical problem of permitting states to transfer their prisoners to federal custody in the same way that the Federal Government had, for some time, been placing prisoners in state custody pursuant to 18 U. S. C. § 4002. And nothing in the legislative history makes this case one of the "rare and exceptional cases" requiring a departure from the statute's plain language. Pp. 483–485.

(c) The contemporaneous and uniform construction of § 5003 (a) by the Bureau of Prisons, the agency that proposed its enactment and is charged with its administration, has been that the statute authorizes contracts based on a broad range of purposes, including such a transfer as is shown by the record in this case. In the absence of any evidence of congressional objection, the agency's interpretation must be given great weight. Pp. 485–487.

625 F. 2d 454, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 487. STEWART, J., filed a dissenting statement, *post*, p. 487.

William A. Nelson argued the cause for petitioner. With him on the briefs was *James L. Morse*.

Barbara E. Etkind argued the cause for the federal respondents. With her on the brief were *Solicitor General McCree*, *Assistant Attorney General Jensen*, and *Deputy Solicitor General Frey*. *John J. Easton, Jr.*, Attorney General of Vermont, argued the cause for respondent Ciuros. With him on the brief were *Peter M. Nowlan* and *Alan B. Coulman*, Assistant Attorneys General.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented by this case is whether a State may transfer a prisoner to federal custody pursuant to 18 U. S. C.

*Briefs of *amicus curiae* urging reversal were filed by *Ernest Winsor* for Families & Friends of Prisoners, Inc., et al.; and by *David J. Gottlieb* for the Kansas Defender Project.

§ 5003 [1] in the absence of a prior determination that the prisoner who is being transferred has a need for specialized treatment available in the federal prison system.

I

In December 1974, the Commissioner of Corrections for the State of Vermont announced that he would soon close the 187-year-old Windsor prison, the State's only maximum-security facility, because Windsor had become inadequate in several respects. *Rebideau* v. *Stoneman*, 398 F. Supp. 805, 808, n. 7 (Vt. 1975). In anticipation of that closing, the United States and Vermont entered into an agreement pursuant to 18 U. S. C. § 5003 (a) by which the United States agreed to house in federal prisons up to 40 prisoners originally committed to the prisons of Vermont.[2] The contract recited that

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[1] Title 18 U. S. C. § 5003 provides in pertinent part:

"(a) The Attorney General, when the Director [of the United States Bureau of Prisons] shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: *Provided*, That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.

. . . . . .

"(c) Unless otherwise specifically provided in the contract, a person committed to the Attorney General hereunder shall be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentence imposed."

[2] The contract between the United States and Vermont provides in pertinent part:

"1. The [United States] will undertake the custody, care and treatment, including the furnishings and subsistence and all necessary medical and hospital services and supplies, of State prisoners committed to the Federal institution. . . .

"2. The State may without prior approval by the [United States] and without individual application to the [United States] transfer up to 40

the Director of the United States Bureau of Prisons had certified that facilities were available at federal institutions to accommodate 40 Vermont prisoners.

In 1975, when Windsor was finally closed, Vermont was left with several minimum-security community correctional centers and the Vermont Correction and Diagnostic Treatment Facility at St. Albans, Vt. St. Albans has the capacity for short-term incarceration of inmates with high security needs, but it is not designed for long-term incarceration of inmates classified as high security risks.

II

The petitioner, Robert Howe, was convicted in a Vermont court of first-degree murder arising out of the rape and strangulation of an elderly female neighbor. He was sentenced to life imprisonment and assigned to the St. Albans facility to begin serving his sentence. Because of the nature of his offense and the length of his term, however, the Classification Committee of the Vermont Department of Corrections determined that he should be kept in a maximum-security facility and recommended that he be transferred to a federal prison. Accordingly, the Vermont Department of Corrections held a hearing to decide whether he should be transferred to a federal institution. Howe was afforded advance notice of the hearing and of the reasons for the proposed transfer; he was present at the hearing; and he was represented by a law adviser from the facility's staff, who submitted various items of evidence in opposition to the proposed transfer.

The hearing officer recommended that the petitioner be transferred to a federal institution on the ground that "no treatment programs exist in the State of Vermont, which could provide both treatment and long term maximum security supervision" for him. App. 25. The hearing officer found

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State prisoners for commitment to a Bureau of Prisons facility." 625 F. 2d 454, 455, n. 1 (1980).

that Howe was dangerous and could not be integrated into a community-based program. The State relied on a psychiatric report describing Howe as a " 'dangerous person who could well repeat the same pattern of assaultive behavior toward women at any time in the future.' " *Id.*, at 26. The hearing officer also found that Howe would be "highly resistant to treatment" and that he was an escape risk. Indeed, Howe had escaped from the maximum-security wing of St. Albans while detained there prior to his trial.

On March 9, 1977, Vermont's Acting Commissioner of Corrections approved Howe's transfer to the federal prison system. Under the terms of the contract between the United States and Vermont, he was incarcerated initially in the federal penitentiary at Atlanta, Ga., and later was transferred to the federal penitentiary at Terre Haute, Ind.

As an inmate in the federal maximum-security penitentiaries, Howe enjoyed the same complete freedom of movement within the institution as other prisoners. By contrast, at St. Albans, he had not been given this freedom of movement, but had been generally confined to the maximum-security wing. The programs at St. Albans were substantially the same as those at the federal prisons, although Howe had less opportunity to take advantage of them because of the restrictions on his mobility at the state facility. The only two programs in which he actually participated at St. Albans were psychiatric counseling and educational courses. At Terre Haute, he ran a sewing machine until he had a heart attack. His principal activities now are knitting and crocheting.

On December 5, 1978, the petitioner filed this civil action in the United States District Court for the District of Vermont, naming as defendants the Attorney General of the United States and the Director of the Federal Bureau of Prisons. Respondent William Ciuros, Vermont's Commissioner of Corrections, intervened. Relying on *Lono* v. *Fenton*, 581 F. 2d 645 (CA7 1978) (en banc), the petitioner challenged his transfer to the federal prison system on the ground that the

federal officials lacked statutory authority to accept custody. It was the petitioner's position that the sole statutory authority for transfers of state inmates, § 5003, requires federal authorities to make an individual determination that each state prisoner so transferred needs a particular specialized treatment program available in the federal prison system. The petitioner argued that no such individual determination had been made in his case, and that the transfer had not been effected for special treatment needs but for general penological reasons, that is, maximum-security incarceration.

Following a hearing, the District Court denied the petitioner's request for relief, holding:

> "[T]he [A]ct plainly and unambiguously requires no showing of specialized treatment needs or facilities before a Vermont state prisoner may be transferred to the federal prison system in accordance with the contract under which [the petitioner] was so transferred. . . . 18 U. S. C. 5003 (a) requires nothing more of the Director of the Bureau of Prisons than a certification that facilities exist within the federal system in which state prisoners may be accommodated. That requirement has been met in the case at hand." 480 F. Supp. 111, 115 (1978).

The Court of Appeals for the Second Circuit affirmed. 625 F. 2d 454 (1980). The court observed that 18 U. S. C. § 5003 authorizes states to contract not simply for "treatment" but for the "custody, care, subsistence, education, treatment, and training of persons convicted." It reasoned that nothing in the language of the statute gives "treatment" primacy or provides a basis for concluding that, whatever other services are provided, "treatment" must always be furnished to prisoners transferred under the statute. While acknowledging that there was a modicum of support in the legislative history for the petitioner's argument, the Court of Appeals rejected it because it "has no basis in the language of the statute." 625 F. 2d, at 457.

We granted certiorari to resolve the conflict in the Circuits. *Sub nom. Howe* v. *Civiletti*, 449 U. S. 1123 (1981).

III

The challenge here is not to the action of the State of Vermont in seeking to transfer the petitioner, but to the authority of the Federal Government, in the official person of the Attorney General, to receive and to hold him in a federal penitentiary. Under 18 U. S. C. § 4001 (a) "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." [3] The petitioner avers that he is being held by the federal authorities illegally because neither § 5003 nor any other provision authorizes his detention. In particular, he argues that § 5003 has a narrow and limited thrust, that is, that a state prisoner may not be transferred to a federal institution except for an identified specialized treatment and that, before any such transfer may be made, the Federal Government must conduct an inquiry and make an individualized determination that the transferee needs, and the federal facility can provide, that treatment.[4] On the other hand, the respondents contend that § 5003 is

[3] The federal respondents argue that the petitioner lacked standing to bring this action because he is not a federal prisoner, but merely a prisoner of the State of Vermont temporarily in the custody of the Federal Government. This argument, raised for the first time in this Court, fails to give adequate weight to the plain language of § 4001 (a) proscribing detention *of any kind* by the United States, absent a congressional grant of authority to detain. If the petitioner is correct that neither § 5003 nor any other Act of Congress authorizes his detention by federal authorities, his detention would be illegal even though that detention is on behalf, and at the pleasure, of the State of Vermont.

[4] Though the Seventh Circuit, in both *Lono* v. *Fenton*, 581 F. 2d 645 (1978) (en banc), and *Anthony* v. *Wilkinson*, 637 F. 2d 1130 (1980), held that absence of suitable state facilities is a precondition for a § 5003 transfer, the petitioner expressly disavows that contention in this Court. Reply Brief for the Petitioner 7. The petitioner argues only that § 5003 requires a finding that the proposed transferee is in need of specialized treatment and that the needed treatment is in fact available in the federal system.

not so limited, and that the petitioner's detention is clearly authorized by the plain language of that provision.

Because § 5003 obviously authorizes federal detention of state prisoners under *some* circumstances, our task is to determine the precise nature of those circumstances and whether appropriate circumstances are present in this case.

A

As in every case involving the interpretation of a statute, analysis must begin with the language employed by Congress. *Rubin* v. *United States*, 449 U. S. 424, 430 (1981); *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 337 (1979). By its terms, § 5003 (a) authorizes the Attorney General to contract with a state or territory "for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of [that] State or Territory." On its face, the authority furnished by this language encompasses much more than a limited authority to provide for the specialized treatment needs of state prisoners. "Treatment" is, after all, only one of several services cataloged; the focus of the statute, is upon care, custody, subsistence, education, and training as well as upon treatment. Nothing in the construction of the provision supports the view that "treatment" is more important than any of the other listed categories, and nothing in the passage can be fairly read as requiring that some kind of "treatment" must be furnished to every state prisoner transferred to a federal facility pursuant to a contract authorized by § 5003 (a).

The petitioner does not contest the breadth of the charter granted by the language just quoted. Rather, he focuses on the requirement that the Director of the Federal Bureau of Prisons certify the availability of "proper and adequate treatment facilities and personnel." The petitioner reads this requirement as imposing a substantive limitation or restriction on the purposes for which prisoners may be transferred: to wit, a prisoner may be transferred only for treatment.

The petitioner's reading of the statute strains the plain meaning of its language. The act of certification by the Director is nothing more than the starting point in the process of contractual negotiation envisioned by § 5003 (a). Absent surplus capacity in the federal system, discussions between federal and state authorities regarding the transfer of state prisoners to federal facilities would be pointless. Once the Director certifies that a surplus capacity exists—that is, that there is room for more inmates—the transfer becomes a possibility. The certification clause cannot be read as requiring any more than that federal facilities and personnel must be available to handle whatever prisoners are received.

There is no special significance to the fact that the Director certifies the existence of "*treatment* facilities," as opposed to prison facilities generally.[5] First, the term "treatment facilities" is an appropriate general reference to the existing federal prison facilities. It is true, of course, that other terms may be used—and, in fact, are used [6]—to describe the federal prisons; that, however, does not belie the appropriateness of the term "treatment facilities" as a general reference to the federal penal system.

Second, if, as the petitioner advocates, the phrase "treatment facilities" is read as a substantive restriction upon the purposes for which a prisoner may be transferred, § 5003 is rendered internally inconsistent. According to the petitioner,

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[5] The petitioner argues that the concept of "treatment" is limited to such things as medical treatment, psychiatric treatment, alcohol or drug rehabilitation programs, and special programs for juveniles. In his view, the concept does not include secure incarceration for dangerous offenders.

[6] The petitioner notes that there are statutes referring to federal prisons as "penal institutions" or "correctional institutions." But those statutes were passed by Congresses other than the Congress that passed § 5003. Moreover, those statutes typically concern the operation or management of prisons as institutional entities rather than processing of prisoners within them. In any event, places of confinement under sentence have long been described in alternative terms.

by virtue of § 5003 (a), a state prisoner may be transferred to a federal prison only if that facility affords him specialized treatment found to be needed. However, § 5003 (c) provides, with certain exceptions not applicable to this case, that all state prisoners in federal custody are subject to the same statutory and regulatory scheme that governs federal prisoners.[7] And that statutory and regulatory scheme contains provisions that would undermine § 5003 (a) as that section is read by the petitioner. For example, by statute, federal prisoners may be transferred from one facility to another at the discretion of the Attorney General, 18 U. S. C. § 4082 (b), and federal officials have discretion to decide which inmates have access to rehabilitation programs, *Moody* v. *Daggett*, 429 U. S. 78, 88, n. 9 (1976). It makes no sense to interpret § 5003 as forcing federal authorities to accept only a state prisoner who is in need of treatment at a particular facility when those same officials are free to transfer that same prisoner from the facility, thereby denying him access to the treatment program.

In sum, the plain language of § 5003 (a) authorizes contracts not simply for treatment, but also for the custody, care, subsistence, education, and training of state prisoners in federal facilities. The certification requirement is simply a housekeeping measure designed to ensure that the federal system has the capacity to absorb the state prisoners. Nothing in the language of § 5003 (a) restricts or limits the use of federal prison facilities to those state prisoners who are in need of some particular treatment.[8]

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[7] See n. 1, *supra*.

[8] Only one Circuit has adopted the reading of § 5003 (a) urged by the petitioner. *Lono* v. *Fenton*, 581 F. 2d 645 (CA7 1978) (en banc). Each of the other Circuits to consider the meaning of § 5003 (a) has rejected the petitioner's interpretation of that provision. *Sisbarro* v. *Warden*, 592 F. 2d 1 (CA1 1979); *Beshaw* v. *Fenton*, 635 F. 2d 239 (CA3 1980); *United States ex rel. Gereau* v. *Henderson*, 526 F. 2d 889 (CA5 1976); *Fletcher* v. *Warden*, 641 F. 2d 850 (CA10 1981).

B

When the terms of a statute are unambiguous, our inquiry comes to an end, except "in 'rare and exceptional circumstances.'" *TVA* v. *Hill*, 437 U. S. 153, 187, n. 33 (1978) (quoting *Crooks* v. *Harrelson*, 282 U. S. 55, 60 (1930)). No rare and exceptional circumstances are present here; our reading of the statute is fully supported by the legislative history of § 5003.

The petitioner disagrees. He notes that, when asked on the Senate floor to explain § 5003 (a), Senator McCarran answered that, whereas 18 U. S. C. § 4002 allows the Federal Government to contract with state officials for the confinement of federal prisoners,

> "[t]his bill would authorize a more or less reciprocal arrangement whereby, under certain conditions in a limited category of cases . . . the Attorney General may contract with State officials for the custody of persons convicted and sentenced under State laws." 97 Cong. Rec. 13543 (1951).

The petitioner finds significance in the Senator's use of the words "under certain conditions" and "in a limited category of cases."

Read as a whole, the legislative record reveals that § 5003 was enacted to provide a practical solution to a simple problem, that is, to permit the states to transfer their prisoners to federal custody in the same way that the Federal Government for years had been placing prisoners in state custody pursuant to 18 U. S. C. § 4002. Until this century, there was no federal prison system to speak of; instead, federal prisoners were housed in state prisons. By 1952, however, a sufficient number of federal prisons had been built that Congress could respond to requests from the states that the Federal Bureau of Prisons provide facilities in cases where state facilities were inadequate in some way. Section 5003 was the congressional response to this evolving situation.

A desire to help states with insufficient facilities, a sentiment that permeates the legislative history of § 5003, may be detected even in the remarks of Senator McCarran quoted by the petitioner. The Senator described the new section as a "reciprocal" of § 4002, one authorizing the Attorney General to extend *to* the states the same type of service he was authorized to receive *from* them under § 4002. Because federal officials exercise broad authority under § 4002, the "reciprocal" authority purportedly extended under § 5003 (a) likely was understood by Congress to be equally broad.

In addition to Senator McCarran's remarks, the petitioner relies heavily upon a passage in the Report of the House Judiciary Committee on the bill that was to become § 5003. The Committee stated:

> "The proposed legislation restricts or limits the use of Federal prison facilities to those convicted State offenders who are in need of treatment. The term "treatment" as used in this bill, in addition to its ordinary meaning of providing medical care, is also meant to include corrective and preventive guidance and training as defined in the Youth Corrections Act." H. R. Rep. No. 1663, 82d Cong., 2d Sess., 2 (1952).

The petitioner's reliance upon this passage is understandable, but a single sentence—especially one taken from a Report issued five months after one chamber, the Senate, had passed § 5003—cannot obscure the unmistakable intent of Congress to create by § 5003 broad authority in federal officials to accept custody of state prisoners in the federal prisons. Indeed, nowhere is this intent clearer than in another passage from the very same page:

> "State prisons for many years housed and cared for Federal prisoners—until the Federal Government built its own institutions. Today, by [virtue of § 4002], the Attorney General is authorized to contract for the care and custody of our Federal prisoners. . . . The commit-

> tee sees no reason why Federal facilities and personnel should not, in turn, be made available for State offenders, provided, of course, the Federal Government is reimbursed for any expenses involved." *Ibid.*

The legislative history of § 5003 reveals that Congress perceived a need to respond to state requests for the federal prison system to undertake "custody, treatment, and training" of state prisoners where the states lacked an institutional capacity to do so themselves. S. Rep. No. 978, 82d Cong., 1st Sess., 2 (1951). It is clear that § 5003 was a broad response to this perceived need. Nothing in the legislative history of § 5003 makes this case one of the "rare and exceptional cases" requiring a departure from the plain language of the statute.

C

Because the Attorney General, and through him the Bureau of Prisons, are charged with the administration of § 5003, their view of the meaning of the statute is entitled to considerable deference. *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 274–275 (1974); *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965). Moreover, in this case, the Bureau's interpretation of the statute merits greater than normal weight because it was the Bureau that drafted the legislation and steered it through Congress with little debate.

The contract between the United States and Vermont that served as the basis for the petitioner's transfer to federal custody is just one indication that the Federal Bureau of Prisons has construed § 5003 as broadly authorizing it to accept whatever prisoners are referred to it by state officials. In nearly 30 years of administering this statute, several Attorneys General have interpreted the statute consistently as a grant of plenary authority to contract with the states, limited only by certification that space and personnel were available.

Furthermore, Congress has had ample opportunity to express whatever dissatisfaction it might have regarding this adminis-

trative interpretation of § 5003. As early as 1952, in its Annual Report, the Bureau of Prisons advised Congress of its view of the statute:

> "[Section 5003] authorize[s] the Attorney General, when adequate facilities and personnel are available, to contract with State officials for the care and custody of State prisoners. . . .
>
> "The confinement of Federal prisoners in State institutions has been authorized since 1776. . . . The present act affords an opportunity for reciprocity which had not hitherto existed. While it is not anticipated that the new statute will be used widely, States may on occasion wish to request Federal care for particular prisoners who need facilities available in the Federal prison system but not in their own. For example, *a State may wish to transfer a vicious intractable offender who cannot be handled readily in its own institutions,* or a female prisoner for whom appropriate facilities are not available, or a prisoner needing special medical or psychiatric care." U. S. Dept. of Justice, Annual Report of the Bureau of Prisons 16–17 (1952) (emphasis added).

Congress indicated no reservation or objection to this interpretation of § 5003 in 1952, or in any year thereafter. Furthermore, in 1965, when Congress added § 5003 (d) so as to include the Canal Zone within the purview of § 5003, the Senate Report expressly described § 5003 (a) as broadly permitting the transfer of persons convicted in the Canal Zone to federal prisons. S. Rep. No. 799, 89th Cong., 1st Sess., 2 (1965).

The contemporaneous and uniform construction of § 5003 (a) by the agency that proposed its enactment and is charged with its enforcement has been that the statute authorizes contracts based upon a broad range of purposes, including the transfer shown by this record. In the absence of any evidence

of congressional objection, the agency's interpretation must be given great weight.

IV

The plain language, the legislative history, and the long-standing administrative interpretation of § 5003 (a) clearly demonstrate that the provision is a broad charter authorizing the transfer of state prisoners to federal custody. There is no basis in § 5003 (a) for the petitioner's challenge to his transfer to federal custody. Given our disposition of this issue, it is unnecessary to address the other arguments made by the petitioner.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE STEWART dissents. He would vacate the judgment and remand the case to the District Court with directions to dismiss the complaint. He is of the view that, although the petitioner could have brought a habeas corpus action in the appropriate Federal District Court by virtue of 18 U. S. C. § 4001 (a), neither that statute nor any other authorized this independent civil action in the United States District Court for the District of Vermont.

JUSTICE STEVENS, concurring in the judgment.

As I read 18 U. S. C. § 5003 (a), quoted *ante*, at 475, n. 1, it authorizes the Federal Government to take custody of state prisoners only "under certain conditions in a limited category of cases." [1] The history of the legislation indicates that it was intended to authorize the use of federal "treatment facilities," that would not otherwise be available to the States, for the custody and treatment of "those convicted State of-

[1] Those were the words used by the Chairman of the Senate Judiciary Committee in explaining the purpose of the bill that became § 5003. See 97 Cong. Rec. 13543 (1951).

fenders who are in need of treatment." [2] The language of the statute is consistent with this purpose. The requirement of a federal certification "that proper and adequate treatment facilities and personnel are available" surely is inconsistent with the view that nothing more than adequate prison accommodations are necessary to justify the transfer of a state prisoner to the federal system.

In this case, however, petitioner presented the State of Vermont with the kind of problem that the federal statute was intended to solve. Petitioner's classification as an espe-

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[2] That is the language in the Report of the House Judiciary Committee. H. R. Rep. No. 1663, 82d Cong., 2d Sess., 2 (1952) (House Report). That Report made it clear that the word "treatment" had been purposefully selected as a limitation upon the authority of the Bureau of Prisons to accept state prisoners into federal custody:

"Frequently, State officials request the Bureau of Prisons to undertake the custody, treatment, and training of State prisoners where specialized types of institutions and training programs are indicated but are not available in the States. These requests usually relate to juveniles and drug addicts, concerning whom many of the States are without satisfactory institutions and training programs. The Bureau of Prisons points out that it now has Federal facilities available, including medical and administrative personnel, to accommodate those State offenders that are in need of the various types of treatment that Federal institutions are providing.

. . . . . .

"The proposed legislation restricts or limits the use of Federal prison facilities to those convicted State offenders who are in need of treatment. The term 'treatment' as used in this bill, in addition to its ordinary meaning of providing medical care, is also meant to include corrective and preventive guidance and training as defined in the Youth Corrections Act (sec. 5006g, title 18, U. S. C.)." *Id.*, at 1, 2.

Attached to the House Report was a letter from the Deputy Attorney General supporting the proposed legislation. The Deputy Attorney General's understanding of the purpose of § 5003 was the same as that of the House Judiciary Committee. See House Report, at 3. The same letter was attached to and quoted in the Senate Report accompanying the bill that became § 5003. See S. Rep. No. 978, 82d Cong., 1st Sess., 1–2 (1951).

cially dangerous offender, together with the closing of Vermont's only maximum-security facility, created a sufficiently unusual situation to cause his transfer to the federal system to fall within the limited category that the statute covers.[3] I therefore concur in the Court's judgment, but I do not share its opinion that Congress intended to give the Federal Bureau of Prisons *carte blanche* to rent out to the States any federal prison accommodations that may be available from time to time.[4]

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[3] Cf. *Anthony* v. *Wilkinson*, 637 F. 2d 1130, 1140 (CA7 1980) ("[E]ven something so far removed from traditional notions of 'treatment' as high security incarceration, with the opportunity to participate in attendant religious, educational, recreational and other programs, in particular cases may satisfy § 5003"), cert. pending, No. 80–1315.

[4] I essentially agree with the Seventh Circuit's interpretation of the statute:

"It was not intended by Section 5003 to put the federal government in the rent-a-prison business unless there was some special treatment need with which the state required assistance. Absent that special need the states were left to care for their own." *Lono* v. *Fenton*, 581 F. 2d 645, 648 (1978) (en banc).

In itself this case is not terribly important, but it is another example of the easy way in which the Executive Branch and this Court cooperate in the continuing transfer of governmental responsibilities from the States to the federal sovereign.

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., ET AL. *v.* DONOVAN, SECRETARY OF LABOR, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79–1429. Argued January 21, 1981—Decided June 17, 1981*

Section 6 (b)(5) of the Occupational Safety and Health Act of 1970 (Act) requires the Secretary of Labor (Secretary), in promulgating occupational safety and health standards dealing with toxic materials or harmful physical agents, to set the standard "which most adequately assures, to the extent feasible, on the basis of the best available evidence" that no employee will suffer material impairment of health. Section 3 (8) of the Act defines the term "occupational safety and health standard" as meaning a standard which requires conditions, or the adoption or use of practices, means, methods, operations, or processes, "reasonably necessary or appropriate" to provide safe or healthful employment and places of employment. Section 6 (f) of the Act provides that the Secretary's determinations "shall be conclusive if supported by substantial evidence in the record considered as a whole." The Secretary, acting through the Occupational Safety and Health Administration (OSHA), promulgated the so-called Cotton Dust Standard limiting occupational exposure to cotton dust (an airborne particle byproduct of the preparation and manufacture of cotton products), exposure to which induces byssinosis, a serious and potentially disabling respiratory disease known in its more severe manifestations as "brown lung" disease. Estimates indicate that at least 35,000 employed and retired cotton mill workers, or 1 in 12, suffer from the most disabling form of byssinosis, and 100,000 employed and retired workers suffer from some form of the disease. The Standard sets permissible exposure levels to cotton dust for the different operations in the cotton industry. Implementation of the Standard depends primarily on a mix of engineering controls, such as installation of ventilation systems, and work practice controls, such as special floor-sweeping procedures. During the 4-year interim period permitted for full compliance with the Standard, employers are required to provide respirators to employees and to transfer employees

*Together with No. 79–1583, *National Cotton Council of America* v. *Donovan, Secretary of Labor, et al.*, also on certiorari to the same court.

unable to wear respirators to another position, if available, having a dust level that meets the Standard's permissible exposure limit, with no loss of earnings or other employment rights or benefits. OSHA estimated the total industrywide cost of compliance as $656.5 million. Petitioners, representing the cotton industry, challenged the validity of the Standard in the Court of Appeals, contending, *inter alia*, that the Act requires OSHA to demonstrate that the Standard reflects a reasonable relationship between the costs and benefits associated with the Standard, that OSHA's determination of the Standard's "economic feasibility" was not supported by substantial evidence, and that the wage guarantee requirement was beyond OSHA's authority. The Court of Appeals upheld the Standard in all major respects. It held that the Act did not require OSHA to compare costs and benefits; that Congress itself balanced the costs and benefits in its mandate to OSHA under § 6 (b) (5) to adopt the most protective feasible standard; and that OSHA's determination of economic feasibility was supported by substantial evidence in the record as a whole. The court also held that OSHA had authority to require employers to guarantee employees' wage and employment benefits following transfer because of inability to wear a respirator.

Held:

1. Cost-benefit analysis by OSHA in promulgating a standard under § 6 (b) (5) is not required by the Act because feasibility analysis is. Pp. 506–522.

(a) The plain meaning of the word "feasible" is "capable of being done," and thus § 6(b) (5) directs the Secretary to issue the standard that most adequately assures that no employee will suffer material impairment of health, limited only by the extent to which this is "capable of being done." In effect then, as the Court of Appeals held, Congress *itself* defined the basic relationship between costs and benefits by placing the "benefit" of the worker's health above all other considerations save those making attainment of this "benefit" unachievable. Any standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in § 6 (b) (5). Pp. 508–512.

(b) Section 3 (8), either alone or in tandem with § 6 (b) (5), does not incorporate a cost-benefit requirement for standards dealing with toxic materials or harmful physical agents. Even if the phrase "reasonably necessary or appropriate" in § 3 (8) might be construed to contemplate some balancing of costs and benefits, Congress specifically chose in § 6 (b) (5) to impose separate and additional requirements for issuance of standards dealing with such materials and agents: it required that those standards be issued to prevent material health impairment

to the extent feasible. To interpret § 3 (8) as imposing an additional and overriding cost-benefit analysis requirement on the issuance of § 6 (b) (5) standards would eviscerate § 6 (b) (5)'s "to the extent feasible" requirement. Pp. 512–513.

(c) The Act's legislative history supports the conclusion that Congress itself in § 6 (b) (5) balanced the costs and benefits. There is no indication whatsoever that Congress intended OSHA to conduct its own cost-benefit analysis before promulgating a toxic-material or harmful-physical-agent standard. Rather, not only does the history confirm that Congress meant "feasible" rather than "cost-benefit" when it used the former term, but it also shows that Congress understood that the Act would create substantial costs for employers, yet intended to impose such costs when necessary to create a safe and healthful working environment. Pp. 514–522.

2. Whether or not in the first instance this Court would find OSHA's findings supported by substantial evidence, it cannot be said that the Court of Appeals on the basis of the whole record "misapprehended or grossly misapplied" the substantial-evidence test when it upheld such findings. Pp. 522–536.

3. Whether or not OSHA has the underlying authority to promulgate a wage guarantee requirement with respect to employees who are transferred to another position when they are unable to wear a respirator, OSHA failed to make the necessary determination or statement of reasons that this requirement was related to achievement of health and safety goals. Pp. 536–540.

199 U. S. App. D. C. 54, 617 F. 2d 636, affirmed in part, vacated in part, and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. STEWART, J., filed a dissenting opinion, *post*, p. 541. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 543. POWELL, J., took no part in the decision of the cases.

Robert H. Bork argued the cause for petitioners in both cases. With him on the briefs for petitioners American Textile Manufacturers Institute, Inc., et al. were *Neil J. King, A. Stephen Hut, Jr., Robert T. Thompson, Samuel K. Abrams, H. J. Elam III, Neil W. Koonce, Dan M. Byrd, Jr., Thomas A. Evins, Roger L. Tuttle, Lovic A. Brooks, Jr., Richard H.*

Monk, Jr., and *C. Powers Dorsett*. *Charles M. Crump* filed briefs for petitioner National Cotton Council of America.

Deputy Solicitor General Geller argued the cause for the federal respondent in both cases. With him on the brief were *Solicitor General McCree, Barry Sullivan, Benjamin W. Mintz, Allen H. Feldman, Dennis K. Kade, Diane E. Burkley,* and *John A. Bryson*. *George H. Cohen* argued the cause for the American Federation of Labor and Congress of Industrial Organizations et al., respondents in both cases under this Court's Rule 19.6. With him on the brief were *Robert M. Weinberg, Jeremiah A. Collins, Laurence Gold, J. Albert Woll, Elliot Bredhoff,* and *Arthur M. Goldberg*.†

JUSTICE BRENNAN delivered the opinion of the Court.

Congress enacted the Occupational Safety and Health Act of 1970 (Act) "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . ." § 2 (b), 84 Stat. 1590, 29 U. S. C. § 651 (b). The Act authorizes the Secretary of Labor to establish, after notice and opportunity to comment, mandatory nationwide standards governing health and safety in the workplace. 29 U. S. C. §§ 655 (a), (b). In 1978, the Secretary, acting through the Occupational Safety and Health Administration

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†Briefs of *amici curiae* urging reversal were filed by *Robert C. Barnard, Richard DeC. Hinds,* and *R. Bruce Dickson* for the American Industrial Health Council; and by *Stephen A. Bokat* and *Stanley T. Kaleczyc* for the Chamber of Commerce of the United States.

J. Davitt McAteer and *John A. Fillion* filed a brief for the Brown Lung Association et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Allen A. Lauterbach* and *C. David Mayfield* for the American Farm Bureau Federation; by *Jerome Powell, W. Scott Railton, Barton C. Green,* and *David Ferber* for the American Iron and Steel Institute; by *William J. Kilberg, Stephen E. Tallent,* and *H. Frederick Tepker* for ASARCO Inc.; by *Edwin H. Seeger* and *William F. Boyd* for Bunker Hill Co.; and by *J. Gordon Arbuckle* and *David B. Robinson* for the Chocolate Manufacturers Association.

(OSHA),[1] promulgated a standard limiting occupational exposure to cotton dust, an airborne particle byproduct of the preparation and manufacture of cotton products, exposure to which induces a "constellation of respiratory effects" known as "byssinosis." 43 Fed. Reg. 27352, col. 3 (1978). This disease was one of the expressly recognized health hazards that led to passage of the Act. S. Rep. No. 91–1282, p. 3 (1970), Legislative History of the Occupational Safety and Health Act of 1970, p. 143 (Comm. Print 1971) (Leg. Hist.).

Petitioners in these consolidated cases, representing the interests of the cotton industry,[2] challenged the validity of the "Cotton Dust Standard" in the Court of Appeals for the District of Columbia Circuit pursuant to § 6 (f) of the Act, 29 U. S. C. § 655 (f). They contend in this Court, as they did below, that the Act requires OSHA to demonstrate that its Standard reflects a reasonable relationship between the costs and benefits associated with the Standard. Respondents, the Secretary of Labor and two labor organizations,[3] counter that Congress balanced the costs and benefits in the Act itself, and that the Act should therefore be construed not to require

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[1] This opinion will use the terms OSHA and the Secretary interchangeably when referring to the agency, the Secretary of Labor, or the Assistant Secretary for Occupational Safety and Health. The Secretary of Labor has delegated the authority to promulgate occupational safety and health standards to the Assistant Secretary. See 29 CFR § 1910.4 (1980).

[2] Petitioners in No. 79–1429 include 12 individual cotton textile manufacturers, and the American Textile Manufacturers Institute, Inc. (ATMI), a trade association representing approximately 175 companies. Brief for Petitioners in No. 79–1429, pp. i, 2. In No. 79–1583, petitioner is the National Cotton Council of America, a nonprofit corporation chartered for the purpose of increasing the consumption of cotton and cotton products. Brief for Petitioner in No. 79–1583, pp. 3–4.

[3] The two labor organizations are the American Federation of Labor and Congress of Industrial Organizations, Industrial Union Department, AFL–CIO, and the Amalgamated Clothing & Textile Workers Union, AFL–CIO. In the Court of Appeals, the labor organizations challenged the Cotton Dust Standard as not sufficiently stringent.

OSHA to do so. They interpret the Act as mandating that OSHA enact the most protective standard possible to eliminate a significant risk of material health impairment, subject to the constraints of economic and technological feasibility. The Court of Appeals held that the Act did not require OSHA to compare costs and benefits. *AFL–CIO* v. *Marshall*, 199 U. S. App. D. C. 54, 617 F. 2d 636 (1979). We granted certiorari, 449 U. S. 817 (1980), to resolve this important question, which was presented but not decided in last Term's *Industrial Union Dept.* v. *American Petroleum Institute*, 448 U. S. 607 (1980),[4] and to decide other issues related to the Cotton Dust Standard.[5]

I

Byssinosis, known in its more severe manifestations as "brown lung" disease, is a serious and potentially disabling respiratory disease primarily caused by the inhalation of cotton dust.[6] See 43 Fed. Reg. 27352–27354 (1978); Exhibit

[4] JUSTICE POWELL, concurring in part and in the judgment, was the only member of the Court to decide the cost-benefit issue expressly. JUSTICE POWELL concluded that the statute "requires the agency to determine that the economic effects of its standard bear a reasonable relationship to the expected benefits." *Industrial Union Dept.* v. *American Petroleum Institute*, 448 U. S., at 667. JUSTICE MARSHALL, dissenting, joined by JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE BLACKMUN, indicated that the statute did not contemplate cost-benefit analysis. See *id.*, at 717–718, n. 30, 719–720, n. 32.

[5] In addition to the cost-benefit issue, the other questions presented and addressed are (1) whether substantial evidence in the record as a whole supports OSHA's determination that the Cotton Dust Standard is economically feasible; and (2) whether OSHA has the authority under the Act to require that employers guarantee the wages and benefits of employees who are transferred to other positions because of their inability to wear respirators.

[6] Cotton dust is defined as "dust present in the air during the handling or processing of cotton, which may contain a mixture of many substances including ground up plant matter, fiber, bacteria, fungi, soil, pesticides, non-cotton plant matter and other contaminants which may have accumu-

6–16, App. 15–22.[7] Byssinosis is a "continuum . . . disease," 43 Fed. Reg. 27354, col. 2 (1978), that has been categorized into four grades.[8] In its least serious form, byssinosis produces both subjective symptoms, such as chest tightness, shortness of breath, coughing, and wheezing, and objective indications of loss of pulmonary functions. *Id.*, at 27352, col. 2. In its most serious form, byssinosis is a chronic and irreversible obstructive pulmonary disease, clinically similar to chronic bronchitis or emphysema, and can be severely disabling. *Ibid.* At worst, as is true of other respiratory diseases including bronchitis, emphysema, and asthma, byssinosis can create an additional strain on cardiovascular functions and can contribute to death from heart failure. See Exhibit 6–73, App. 72 ("there is an association between mortality and the extent of dust exposure"). One authority has described the increasing seriousness of byssinosis as follows:

> "In the first few years of exposure [to cotton dust], symptoms occur on Monday, or other days after absence

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lated with the cotton during the growing, harvesting and subsequent processing or storage periods. Any dust present during the handling and processing of cotton through the weaving or knitting of fabrics, and dust present in other operations or manufacturing processes using new or waste cotton fibers or cotton fiber by-products from textile mills are considered cotton dust." 29 CFR § 1910.1043 (b) (1980) (Cotton Dust Standard).

[7] References are made throughout this opinion to the Joint Appendix filed in this Court (App.), and to the Joint Appendix lodged in the Court of Appeals below (Ct. of App. J. A.).

[8] Known generally as the Schilling classification grades, they include:

"[Grade] ½: slight acute effect of dust on ventilatory capacity; no evidence of chronic ventilatory impairment.

"[Grade] 1: definite acute effect of dust on ventilatory capacity; no evidence of chronic ventilatory impairment.

"[Grade] 2: evidence of slight to moderate irreversible impairment of ventilatory capacity.

"[Grade] 3: evidence of moderate to severe irreversible impairment of ventilatory capacity." Exhibit 6–27, App. 25; see 41 Fed. Reg. 56500–56501 (1976).

> from the work environment; later, symptoms occur on other days of the week; and eventually, symptoms are continuous, even in the absence of dust exposure." A. Bouhuys, Byssinosis in the United States, Exhibit 6–16, App. 15.[9]

While there is some uncertainty over the manner in which the disease progresses from its least serious to its disabling grades, it is likely that prolonged exposure contributes to the progression. 43 Fed. Reg. 27354, cols. 1 and 2 (1978); Ex-

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[9] Descriptions of the disease by individual mill workers, presented in hearings on the Cotton Dust Standard before an Administrative Law Judge, are more vivid:

"When they started speeding the looms up the dust got finer and more and more people started leaving the mill with breathing problems. My mother had to leave the mill in the early fifties. Before she left, her breathing got so short she just couldn't hold out to work. My step-father left the mill on account of breaching [*sic*] problems. He had coughing spells til he couldn't breath [*sic*], like a child's whooping cough. Both my sisters who work in the mill have breathing problems. My husband had to give up his job when he was only fifty-four years old because of the breathing problem." Ct. of App. J. A. 3791.

"I suppose I had a breathing problem since 1973. I just kept on getting sick and began losing time at the mill. Every time that I go into the mill I get deathly sick, choking and vomiting losing my breath. It would blow down all that lint and cotton and I have clothes right here where I have wore and they have been washed several times and I would like for you all to see them. That will not come out in washing.

"I am only fifty-seven years old and I am retired and I can't even get to go to church because of my breathing. I get short of breath just walking around the house or dressing [or] sometimes just watching T. V. I cough all the time." *Id.*, at 3793.

". . . I had to quit because I couldn't lay down and rest without oxygen in the night and my doctor told me I would have to get out of there . . . . I couln't [*sic*] even breathe, I had to get out of the door so I could breathe and he told me not to go back in [the mill] under any circumstances." *Id.*, at 3804.

Byssinosis is not a newly discovered disease, having been described as early as in the 1820's in England, App. 404–405, and observed in Belgium in a study of 2,000 cotton workers in 1845, Exhibit 6–16, App. 15.

hibit 6–27, App. 25; Exhibit 11, App. 152. It also appears that a worker may suddenly contract a severe grade without experiencing milder grades of the disease. Exhibit 41, App. 192.[10]

Estimates indicate that at least 35,000 employed and retired cotton mill workers, or 1 in 12 such workers, suffer from the most disabling form of byssinosis.[11] 43 Fed. Reg. 27353, col. 3 (1978); Exhibit 124, App. 347. The Senate Report accompanying the Act cited estimates that 100,000 active and retired workers suffer from some grade of the disease. S. Rep. No. 91–1282, p. 3 (1970), Leg. Hist. 143. One study found that over 25% of a sample of active cotton-preparation and yarn-manufacturing workers suffer at least some form of the disease at a dust exposure level common prior to adoption of the current Standard. 43 Fed. Reg. 27355, col. 3 (1978); Exhibit 6–51, App. 44.[12] Other studies confirm these general findings on the prevalence of byssinosis. See, *e. g.*, Ct. of App. J. A. 3683; Ex. 6–56, *id.*, at 376–385.

Not until the early 1960's was byssinosis recognized in the United States as a distinct occupational hazard associated with cotton mills. S. Rep. No. 91–1282, *supra*, at 3, Leg.

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[10] As an expert representing the industry noted:

"[T]he assumption is often made that the disorder progresses from ½ to 1 to 2 to 3 and, thus, all grades reflect the progress of the individual's disability. In many instances, however, there is no progression at all. Sometimes Grade 3 seems to appear *de novo*, or there is a jump from 1 to 3. Among those who develop permanent disability, Grade 2 very often never occurs." Exhibit 41, App. 192.

[11] The criterion of disability used for the 35,000-worker estimate was a Forced Expiratory Volume (FEV_1) measurement of pulmonary function of 1.2 liters or less. 43 Fed. Reg. 27353, col. 3 (1978). An FEV_1 of 1.2 liters "is a small fraction of the pulmonary performance of a normal lung." *Ibid.*; Ct. of App. J. A. 1231.

[12] There are between 126,000 and 200,000 active workers in the yarn-preparation and manufacturing segments of the cotton industry. 43 Fed. Reg. 27379, col. 2 (1978).

Hist. 143.[13] In 1966, the American Conference of Governmental Industrial Hygienists (ACGIH), a private organization, recommended that exposure to total cotton dust[14] be limited to a "threshold limit value" of 1,000 micrograms per cubic meter of air (1,000 $\mu g/m^3$) averaged over an 8-hour workday. See 43 Fed. Reg. 27351, col. 1 (1978). The United States Government first regulated exposure to cotton dust in 1968, when the Secretary of Labor, pursuant to the Walsh-Healey Act, 41 U. S. C. § 35 (e), promulgated airborne contaminant threshold limit values, applicable to public contractors, that included the 1,000 $\mu g/m^3$ limit for total cotton dust. 34 Fed. Reg. 7953 (1969).[15] Following passage of the Act in 1970, the 1,000 $\mu g/m^3$ standard was adopted as an "established Federal standard" under § 6 (a) of the Act, 84 Stat. 1593, 29 U. S. C. § 655 (a), a provision designed to guarantee immediate protection of workers for the period between enactment of the statute and promulgation of permanent standards.[16]

In 1974, ACGIH, adopting a new measurement unit of respirable rather than total dust, lowered its previous expo-

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[13] Indeed the Senate Report on the Act expressly observed:

"Studies of particular industries provide specific emphasis regarding the magnitude of the problem. For example, despite repeated warnings over the years from other countries that their cotton workers suffered from lung disease, it is only within the past decade that we have recognized byssinosis as a distinct occupational disease among workers in American cotton mills." S. Rep. 91–1282, p. 3 (1970), Leg. Hist. 143.

[14] "Total dust" includes both respirable and nonrespirable cotton dust.

[15] The Secretary of Labor adopted the threshold limit values contained in a list that had been prepared by the ACGIH.

[16] Section 6 (a) of the Act, as set forth in 29 U. S. C. § 655 (a), provides in pertinent part:

"[T]he Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard . . . any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees."

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sure limit recommendation to 200 $\mu g/m^3$ measured by a vertical elutriator, a device that measures cotton dust particles 15 microns or less in diameter. 43 Fed. Reg. 27351, col. 1, 27355, col. 2 (1978).[17] That same year, the Director of the National Institute for Occupational Safety and Health (NIOSH),[18] pursuant to the Act, 29 U. S. C. §§ 669 (a)(3), 671 (d)(2), submitted to the Secretary of Labor a recommendation for a cotton dust standard with a permissible exposure limit (PEL) that "should be set at the lowest level feasible, but in no case at an environmental concentration as high as 0.2 mg lint-free cotton dust/cu m," or 200 $\mu g/m^3$ of lint-free respirable dust.[19] Ex. 1, Ct. of App. J. A. 11; 41 Fed. Reg. 56500, col. 1 (1976). Several months later, OSHA published an Advance Notice of Proposed Rulemaking, 39 Fed. Reg. 44769 (1974), requesting comments from interested parties on the NIOSH recommendation and other related matters. Soon thereafter, the Textile Worker's Union

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[17] In many cotton-preparation and manufacturing operations, including opening, picking, and carding, 1,000 $\mu g/m^3$ of total dust is roughly equivalent to 500 $\mu g/m^3$ of respirable dust. App. 464; 43 Fed. Reg. 27361, col. 2 (1978); see n. 22, *infra*.

[18] The Act established the National Institute for Occupational Safety and Health as part of the then Department of Health, Education, and Welfare. NIOSH is authorized, *inter alia*, to "develop and establish recommended occupational safety and health standards." 29 U. S. C. § 671 (c)(1). At the request of the Secretary of Labor or the Secretary of HEW, or on his own initiative, the Director of NIOSH may "conduct such research and experimental programs as he determines are necessary for the development of criteria for new and improved occupational safety and health standards, and . . . after consideration of the results of such research and experimental programs make recommendations concerning new or improved occupational safety and health standards." § 671 (d).

[19] NIOSH presented its recommendation in a lengthy and detailed document entitled "Criteria for a Recommended Standard: Occupational Exposure to Cotton Dust." Ex. 1, Ct. of App. J. A. 11–169. The report examined the effects of cotton dust exposure and suggested implementation of work practices, engineering controls, medical surveillance, and monitoring to decrease exposure to the recommended level.

of America, joined by the North Carolina Public Interest Research Group, petitioned the Secretary, urging a more stringent PEL of 100 $\mu g/m^3$.

On December 28, 1976, OSHA published a proposal to replace the existing federal standard on cotton dust with a new permanent standard, pursuant to § 6 (b)(5) of the Act, 29 U. S. C. § 655 (b)(5). 41 Fed. Reg. 56498. The proposed standard contained a PEL of 200 $\mu g/m^3$ of vertical elutriated lint-free respirable cotton dust for all segments of the cotton industry. *Ibid.* It also suggested an implementation strategy for achieving the PEL that relied on respirators for the short term and engineering controls for the long term. *Id.*, at 56506, cols. 2 and 3. OSHA invited interested parties to submit written comments within a 90-day period.[20]

Following the comment period, OSHA conducted three hearings in Washington, D. C., Greenville, Miss., and Lubbock, Tex., that lasted over 14 days. Public participation was widespread, involving representatives from industry and the work force, scientists, economists, industrial hygienists, and many others. By the time the informal rulemaking procedure had terminated, OSHA had received 263 comments and 109 notices of intent to appear at the hearings. 43 Fed. Reg. 27351, col. 2 (1978). The voluminous record, composed of a transcript of written and oral testimony, exhibits, and posthearing comments and briefs, totaled some 105,000 pages. 199 U. S. App. D. C., at 65, 617 F. 2d, at 647. OSHA issued its final Cotton Dust Standard—the one challenged in the instant case—on June 23, 1978. Along with an accompanying statement of findings and reasons, the Standard occupied 69 pages of the Federal Register. 43 Fed. Reg. 27350–27418 (1978); see 29 CFR § 1910.1043 (1980).

The Cotton Dust Standard promulgated by OSHA estab-

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[20] The Act specifies an informal rulemaking procedure to accompany the promulgation of occupational safety and health standards. See 29 U. S. C. §§ 655 (b)(2), (3), (4).

lishes mandatory PEL's over an 8-hour period of 200 $\mu g/m^3$ for yarn manufacturing,[21] 750 $\mu g/m^3$ for slashing and weaving operations, and 500 $\mu g/m^3$ for all other processes in the cotton industry.[22] 29 CFR § 1910.1043 (e) (1980). These levels represent a relaxation of the proposed PEL of 200 $\mu g/m^3$ for all segments of the cotton industry.

OSHA chose an implementation strategy for the Standard that depended primarily on a mix of engineering controls, such as installation of ventilation systems,[23] and work practice controls, such as special floor-sweeping procedures. Full compliance with the PEL's is required within four years, except to the extent that employers can establish that the engineering and work practice controls are infeasible. § 1910.1043 (e)(1). During this compliance period, and at certain other

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[21] The Standard provides that exposure to lint-free respirable cotton dust may be measured by a vertical elutriator, with its 15-micron particle size cutoff, or "a method of equivalent accuracy and precision." 29 CFR § 1910.1043 (e) (1980).

[22] The manufacturing of cotton textile products is divided into several different stages. (1) In the operations of *opening, picking, carding, drawing,* and *roving,* raw cotton is cleaned and prepared for spinning into yarn. Brief for Petitioners in No. 79–1429, p. 7, n. 12. (2) In the operations of *spinning, twisting, winding, spooling,* and *warping,* the prepared cotton is made into yarn and readied for weaving and other processing. *Id.,* at 7, n. 13. (3) In *slashing* and *weaving,* the yarn is manufactured into a woven fabric. *Id.,* at 7, n. 14. The Cotton Dust Standard defines "yarn manufacturing" to mean "all textile mill operations from opening to, but not including, slashing and weaving." 29 CFR § 1910.1043 (b) (1980). See generally 43 Fed. Reg. 27365, cols. 1 and 2 (1978).

The nontextile industries covered by the Standard's 500 $\mu g/m^3$ PEL include, but are not limited to, "warehousing, compressing of cotton lint, classing and marketing, using cotton yarn (i. e. knitting), reclaiming and marketing of textile manufacturing waste, delinting of cottonseed, marketing and converting of linters, reclaiming and marketing of gin motes and batting, yarn felt manufacturing using waste cotton fibers and by products." *Id.,* at 27360, col. 3.

[23] Ventilation systems include general controls, such as central air-conditioning, and local exhaust controls, which capture emissions of cotton dust as close to the point of generation as possible. See *id.,* at 27363–27364.

times, the Standard requires employers to provide respirators to employees. § 1910.1043 (f). Other requirements include monitoring of cotton dust exposure, medical surveillance of all employees, annual medical examinations, employee education and training programs, and the posting of warning signs. A specific provision also under challenge in the instant case requires employers to transfer employees unable to wear respirators to another position, if available, having a dust level at or below the Standard's PEL's, with "no loss of earnings or other employment rights or benefits as a result of the transfer." § 1910.1043 (f)(2)(v).

On the basis of the evidence in the record as a whole, the Secretary determined that exposure to cotton dust represents a "significant health hazard to employees," 43 Fed. Reg. 27350, col. 1 (1978), and that "the prevalence of byssinosis should be significantly reduced" by the adoption of the Standard's PEL's, *id.*, at 27359, col. 3. In assessing the health risks from cotton dust and the risk reduction obtained from lowered exposure, OSHA relied particularly on data showing a strong linear relationship between the prevalence of byssinosis and the concentration of lint-free respirable cotton dust. *Id.*, at 27355–27359; Exhibit 6–51, App. 29–55. See also Ex. 6–17, Ct. of App. J. A. 235–245; Ex. 38D, *id.*, at 1492–1839. Even at the 200 $\mu g/m^3$ PEL, OSHA found that the prevalence of at least Grade ½ byssinosis would be 13% of all employees in the yarn manufacturing sector. 43 Fed. Reg. 27359, cols. 2 and 3 (1978).

In promulgating the Cotton Dust Standard, OSHA interpreted the Act to require adoption of the most stringent standard to protect against material health impairment, bounded only by technological and economic feasibility. *Id.*, at 27361, col. 3. OSHA therefore rejected the industry's alternative proposal for a PEL of 500 $\mu g/m^3$ in yarn manufacturing, a proposal which would produce a 25% prevalence of at least Grade ½ byssinosis. The agency expressly found the Standard to be both technologically and economically feasi-

ble based on the evidence in the record as a whole. Although recognizing that permitted levels of exposure to cotton dust would still cause some byssinosis, OSHA nevertheless rejected the union proposal for a 100 $\mu g/m^3$ PEL because it was not within the "technological capabilities of the industry." *Id.*, at 27359–27360. Similarly, OSHA set PEL's for some segments of the cotton industry at 500 $\mu g/m^3$ in part because of limitations of technological feasibility. *Id.*, at 27361, col. 3. Finally, the Secretary found that "engineering dust controls in weaving may not be feasible even with massive expenditures by the industry," *id.*, at 27360, col. 2, and for that and other reasons adopted a less stringent PEL of 750 $\mu g/m^3$ for weaving and slashing.

The Court of Appeals upheld the Standard in all major respects.[24] The court rejected the industry's claim that OSHA failed to consider its proposed alternative or give sufficient reasons for failing to adopt it. 199 U. S. App. D. C., at 70–72, 617 F. 2d, at 652–654. The court also held that the Standard was "reasonably necessary and appropriate" within the meaning of § 3 (8) of the Act, 29 U. S. C. § 652 (8), because of the risk of material health impairment caused by exposure to cotton dust. 199 U. S. App. D. C., at 72–73, and n. 83, 617 F. 2d, at 654–655, and n. 83. Rejecting the industry position that OSHA must demonstrate that the benefits of the Standard are proportionate to its costs, the court instead agreed with OSHA's interpretation that the Standard must protect employees against material health impairment subject only to the limits of technological and economic feasibility. *Id.*, at 80–84, 617 F. 2d, at 662–666. The court held that "Congress itself struck the balance between costs and

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[24] The court remanded to the agency that portion of the Standard dealing with the cottonseed oil industry, after concluding that the record failed to establish adequately the Standard's economic feasibility. *AFL–CIO* v. *Marshall*, 199 U. S. App. D. C. 54, 87, 95, 617 F. 2d 636, 669, 677 (1979).

benefits in the mandate to the agency" under § 6 (b)(5) of the Act, 29 U. S. C. § 655 (b)(5), and that OSHA is powerless to circumvent that judgment by adopting less than the most protective feasible standard. 199 U. S. App. D. C., at 81, 617 F. 2d, at 663. Finally, the court held that the agency's determination of technological and economic feasibility was supported by substantial evidence in the record as a whole. *Id.*, at 73–80, 617 F. 2d, at 655–662.

We affirm in part, and vacate in part.[25]

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[25] The postargument motions of the several parties for leave to file supplemental memoranda are granted. We decline to adopt the suggestion of the Secretary of Labor that we should "vacate the judgment of the court of appeals and remand the case so that the record may be returned to the Secretary for further consideration and development." Supplemental Memorandum for Federal Respondent 4. We also decline to adopt the suggestion of petitioners that we should "hold these cases in abeyance and . . . remand the record to the court of appeals with an instruction that the record be remanded to the agency for further proceedings." Response of Petitioners to Supplemental Memorandum for Federal Respondent 4.

At oral argument, and in a letter addressed to the Court after oral argument, petitioners contended that the Secretary's recent amendment of OSHA's so-called "Cancer Policy" in light of this Court's decision in *Industrial Union Dept.* v. *American Petroleum Institute*, 448 U. S. 607 (1980), was relevant to the issues in the present cases. We disagree.

OSHA amended its Cancer Policy to "carry out the Court's interpretation of the Occupational Safety and Health Act of 1970 that consideration must be given to the significance of the risk in the issuance of a carcinogen standard and that OSHA must consider all relevant evidence in making these determinations." 46 Fed. Reg. 4889, col. 3 (1981). Previously, although lacking such evidence as dose-response data, the Secretary presumed that no safe exposure level existed for carcinogenic substances. *Industrial Union Dept.* v. *American Petroleum Institute, supra*, at 620, 624–625, 635–636, nn. 39 and 40 (plurality opinion). Following this Court's decision, OSHA deleted those provisions of the Cancer Policy which required the "automatic setting of the lowest feasible level" without regard to determinations of risk significance. 46 Fed. Reg. 4890, col. 1 (1981).

In distinct contrast with its Cancer Policy, OSHA expressly found that "exposure to cotton dust presents a significant health hazard to employees," 43 Fed. Reg. 27350, col. 1 (1978), and that "cotton dust produced

II

The principal question presented in these cases is whether the Occupational Safety and Health Act requires the Secretary, in promulgating a standard pursuant to § 6 (b)(5) of the Act, 29 U. S. C. § 655 (b)(5), to determine that the costs of the standard bear a reasonable relationship to its benefits. Relying on §§ 6 (b)(5) and 3 (8) of the Act, 29 U. S. C. §§ 655 (b)(5) and 652 (8), petitioners urge not only that OSHA must show that a standard addresses a significant risk of material health impairment, see *Industrial Union Dept.* v. *American Petroleum Institute*, 448 U. S., at 639 (plurality opinion), but also that OSHA must demonstrate that the reduction in risk of material health impairment is significant in light of the costs of attaining that reduction. See Brief for Petitioners in No. 79–1429, pp. 38–41.[26] Respond-

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significant health effects at low levels of exposure," *id.*, at 27358, col. 2. In addition, the agency noted that "grade ½ byssinosis and associated pulmonary function decrements are significant health effects in themselves and should be prevented in so far as possible." *Id.*, at 27354, col. 2. In making its assessment of significant risk, OSHA relied on dose-response curve data (the Merchant Study) showing that 25% of employees suffered at least Grade ½ byssinosis at a 500 $\mu g/m^3$ PEL, and that 12.7% of all employees would suffer byssinosis at the 200 $\mu g/m^3$ PEL standard. *Id.*, at 27358, cols. 2 and 3. Examining the Merchant Study in light of other studies in the record, the agency found that "the Merchant study provides a reliable assessment of health risk to cotton textile workers from cotton dust." Id., at 27357, col. 3. OSHA concluded that the "prevalence of byssinosis should be significantly reduced" by the 200 $\mu g/m^3$ PEL. *Id.*, at 27359, col. 3; see *id.*, at 27359, col. 1 ("200 $\mu g/m^3$ represents a significant reduction in the number of affected workers"). It is difficult to imagine what else the agency could do to comply with this Court's decision in *Industrial Union Dept.* v. *American Petroleum Institute.*

[26] Petitioners ATMI et al. express their position in several ways. They maintain that OSHA "is required to show that a reasonable relationship exists between the risk reduction benefits and the costs of its standards." Brief for Petitioners in No. 79–1429, p. 36. Petitioners also suggest that OSHA must show that "the standard is expected to achieve a *significant reduction in* [the significant risk of material health impairment]" based on

ents on the other hand contend that the Act requires OSHA to promulgate standards that eliminate or reduce such risks "to the extent such protection is technologically and economically feasible." Brief for Federal Respondent 38; Brief for Union Respondents 26–27.[27] To resolve this debate, we must

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"an assessment of the costs of achieving it." *Id.*, at 38, 40. Allowing that "[t]his does not mean that OSHA must engage in a rigidly formal cost-benefit calculation that places a dollar value on employee lives or health," *id.*, at 39, petitioners describe the required exercise as follows:

"First, OSHA must make a responsible determination of the costs and risk reduction benefits of its standard. Pursuant to the requirement of Section 6 (f) of the Act, this determination must be factually supported by substantial evidence in the record. The subsequent determination whether the reduction in health risk is 'significant' (based upon the factual assessment of costs and benefits) is a judgment to be made by the agency in the first instance." *Id.*, at 40.

Respondent Secretary disputes petitioners' description of the exercise, claiming that any meaningful balancing must involve "placing a [dollar] value on human life and freedom from suffering," Brief for Federal Respondent 59, and that there is no other way but through formal cost-benefit analysis to accomplish petitioners' desired balancing, *id.*, at 59–60. Cost-benefit analysis contemplates "systematic enumeration of all benefits and all costs, tangible and intangible, whether readily quantifiable or difficult to measure, that will accrue to all members of society if a particular project is adopted." E. Stokey & R. Zeckhauser, A Primer for Policy Analysis 134 (1978); see Commission on Natural Resources, National Research Council, Decision Making for Regulating Chemicals in the Environment 38 (1975). See generally E. Mishan, Cost-Benefit Analysis (1976); Prest & Turvey, Cost-Benefit Analysis, 300 Economic Journal 683 (1965). Whether petitioners' or respondent's characterization is correct, we will sometimes refer to petitioners' proposed exercise as "cost-benefit analysis."

[27] As described by the union respondents, the test for determining whether a standard promulgated to regulate a "toxic material or harmful physical agent" satisfies the Act has three parts:

"First, whether the 'place of employment is unsafe—in the sense that significant risks are present and can be eliminated or lessened by a change in practices.' [*Industrial Union Dept., supra,* at 642 (plurality opinion).] Second, whether of the possible available correctives the Secretary has

turn to the language, structure, and legislative history of the Act.

A

The starting point of our analysis is the language of the statute itself. *Steadman* v. *SEC*, 450 U. S. 91, 97 (1981); *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 337 (1979). Section 6 (b)(5) of the Act, 29 U. S. C. § 655 (b)(5) (emphasis added), provides:

> "The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." [28]

Although their interpretations differ, all parties agree that the phrase "to the extent feasible" contains the critical language in § 6 (b)(5) for purposes of these cases.

The plain meaning of the word "feasible" supports respondents' interpretation of the statute. According to Webster's Third New International Dictionary of the English Language 831 (1976), "feasible" means "capable of being

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selected '*the* standard . . . that is most protective.' *Ibid.* Third, whether that standard is 'feasible.'" Brief for Union Respondents 40–41. We will sometimes refer to this test as "feasibility analysis."

[28] Section 6(b)(5) of the Act, 29 U. S. C. § 655 (b)(5), also provides: "Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria, and of the performance desired."

done, executed, or effected." Accord, the Oxford English Dictionary 116 (1933) ("Capable of being done, accomplished or carried out"); Funk & Wagnalls New "Standard" Dictionary of the English Language 903 (1957) ("That may be done, performed or effected"). Thus, § 6 (b)(5) directs the Secretary to issue the standard that "most adequately assures . . . that no employee will suffer material impairment of health," limited only by the extent to which this is "capable of being done." In effect then, as the Court of Appeals held, Congress itself defined the basic relationship between costs and benefits, by placing the "benefit" of worker health above all other considerations save those making attainment of this "benefit" unachievable. Any standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in § 6 (b)(5). Thus, cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is.[29] See *Industrial Union Dept.* v. *American Petroleum Institute,* 448 U. S., at 718–719 (MARSHALL, J., dissenting).

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[29] In these cases we are faced with the issue whether the Act requires OSHA to balance costs and benefits in promulgating a *single* toxic material and harmful physical agent standard under § 6 (b)(5). Petitioners argue that without cost-benefit balancing, the issuance of a single standard might result in a "serious misallocatio[n] of the finite resources that are available for the protection of worker safety and health," given the other health hazards in the workplace. Reply Brief for Petitioners in No. 79–1429, p. 10; see Brief for Petitioners in No. 79–1429, pp. 38–39; Brief for Chamber of Commerce of United States as *Amicus Curiae* 12; Brief for American Industrial Health Council as *Amicus Curiae* 19. This argument is more properly addressed to other provisions of the Act which may authorize OSHA to explore costs and benefits for deciding between issuance of several standards regulating different varieties of health and safety hazards, *e. g.,* § 6 (g) of the Act, 29 U. S. C. § 655 (g); see *Industrial Union Dept.* v. *American Petroleum Institute,* 448 U. S., at 643–644; see also Case Comment, 60 B. U. L. Rev. 115, 122, n. 52 (1980), or for promulgating other types of standards not issued under § 6 (b)(5). We express no view on these questions.

When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute. One early example is the Flood Control Act of 1936, 33 U. S. C. § 701:

> "[T]he Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if the *benefits to whomsoever they may accrue are in excess of the estimated costs*, and if the lives and social security of people are otherwise adversely affected." (Emphasis added.)

A more recent example is the Outer Continental Shelf Lands Act Amendments of 1978, 43 U. S. C. § 1347 (b) (1976 ed., Supp. III), providing that offshore drilling operations shall use

> "the best available and safest technologies which the Secretary determines to be economically *feasible*, wherever failure of equipment would have a significant effect on safety, health, or the environment, except where the Secretary determines that the *incremental benefits are clearly insufficient to justify the incremental costs of using such technologies.*"

These and other statutes[30] demonstrate that Congress uses

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[30] See, *e. g.*, Energy Policy and Conservation Act of 1975, 42 U. S. C. §§ 6295 (c), (d) (1976 ed., Supp. III); Federal Water Pollution Control Act Amendments of 1972, 33 U. S. C. §§ 1312 (b)(1), (2), 1314 (b)(1)(B); Clean Water Act of 1977, 33 U. S. C. § 1314 (b)(4)(B) (1976 ed., Supp. III); Clean Air Act Amendments of 1970, 42 U. S. C. § 7545 (c)(2)(B) (1976 ed., Supp. III). In the Federal Water Pollution Control Act Amendments of 1972, Congress directed the Administrator to consider "the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application." 33 U. S. C. § 1314 (b)(1) ("BPT" limitations). With regard to 1987 effluent limitations, the Administrator is directed to consider total cost, but not in comparison with effluent reduction benefits. § 1314 (b)(2)(B) ("BAT" limitations). See

specific language when intending that an agency engage in cost-benefit analysis. See *Industrial Union Dept.* v. *American Petroleum Institute, supra,* at 710, n. 27 (MARSHALL, J., dissenting). Certainly in light of its ordinary meaning, the word "feasible" cannot be construed to articulate such con-

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EPA v. *National Crushed Stone Assn.*, 449 U. S. 64, 71, n. 10, 76–77 (1980).

In other statutes, Congress has used the phrase "unreasonable risk," accompanied by explanation in legislative history, to signify a generalized balancing of costs and benefits. See, *e. g.*, the Consumer Product Safety Act of 1972, 15 U. S. C. § 2056 (a) ("unreasonable risk of injury"); H. R. Rep. No. 92–1153, p. 33 (1972) (where the House stated: "It should be noted that the Commission's authority to promulgate standards under this bill is limited to instances where the hazard associated with a consumer product presents an unreasonable risk of death, injury, or serious or frequent illness. . . . Protection against unreasonable risks is central to many Federal and State safety statutes and the courts have had broad experience in interpreting the term's meaning and application. It is generally expected that the determination of unreasonable hazard will involve the Commission in balancing the probability that risk will result in harm and the gravity of such harm against the effect on the product's utility, cost, and availability to the consumer"); S. Rep. No. 92–749, pp. 14–15 (1972). See also *Aqua Slide 'N' Dive Corp.* v. *Consumer Product Safety Comm'n*, 569 F. 2d 831, 839 (CA5 1978); *Forester* v. *Consumer Product Safety Comm'n*, 182 U. S. App. D. C. 153, 168, 559 F. 2d 774, 789 (1977). The error of several cases finding a cost-benefit analysis mandate in the Act is their reliance on the different language and clear legislative history of the Consumer Product Safety Act to reach their conclusions. See *Texas Independent Ginners Assn.* v. *Marshall*, 630 F. 2d 398, 410 (CA5 1980); *American Petroleum Institute* v. *OSHA*, 581 F. 2d 493, 502–503 (CA5 1978), aff'd on other grounds, *Industrial Union Dept.* v. *American Petroleum Institute, supra.*

Senator Chiles was sufficiently certain that the Act did not contemplate cost-benefit analysis that he introduced an amendment in 1973 that, *inter alia*, "directs the Secretary to recognize the cost-benefit ratio in promulgating a new standard and to publish information relative to the projected financial impact. This provision will promote the development of standards justifiable in terms of the benefits to be derived and afford those to be affected an opportunity to make a reasoned evaluation of the proposal." 119 Cong. Rec. 42151 (1973).

gressional intent. We therefore reject the argument that Congress required cost-benefit analysis in § 6 (b)(5).

B

Even though the plain language of § 6 (b)(5) supports this construction, we must still decide whether § 3 (8), the general definition of an occupational safety and health standard, either alone or in tandem with § 6 (b)(5), incorporates a cost-benefit requirement for standards dealing with toxic materials or harmful physical agents. Section 3 (8) of the Act, 29 U. S. C. § 652 (8) (emphasis added), provides:

> "The term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, *reasonably necessary or appropriate* to provide safe or healthful employment and places of employment."

Taken alone, the phrase "reasonably necessary or appropriate" might be construed to contemplate some balancing of the costs and benefits of a standard. Petitioners urge that, so construed, § 3 (8) engrafts a cost-benefit analysis requirement on the issuance of § 6 (b)(5) standards, even if § 6 (b)(5) itself does not authorize such analysis. We need not decide whether § 3 (8), standing alone, would contemplate some form of cost-benefit analysis. For even if it does, Congress specifically chose in § 6 (b)(5) to impose separate and additional requirements for issuance of a subcategory of occupational safety and health standards dealing with toxic materials and harmful physical agents: it required that those standards be issued to prevent material impairment of health *to the extent feasible*. Congress could reasonably have concluded that *health* standards should be subject to different criteria than *safety* standards because of the special problems presented in regulating them. See *Industrial Union Dept.* v. *American Petroleum Institute*, 448 U. S., at 649, n. 54 (plurality opinion).

Agreement with petitioners' argument that § 3 (8) imposes an additional and overriding requirement of cost-benefit analysis on the issuance of § 6 (b)(5) standards would eviscerate the "to the extent feasible" requirement. Standards would inevitably be set at the level indicated by cost-benefit analysis, and not at the level specified by § 6 (b)(5). For example, if cost-benefit analysis indicated a protective standard of 1,000 $\mu g/m^3$ PEL, while feasibility analysis indicated a 500 $\mu g/m^3$ PEL, the agency would be forced by the cost-benefit requirement to choose the less stringent point.[31] We cannot believe that Congress intended the general terms of § 3 (8) to countermand the specific feasibility requirement of § 6 (b)(5). Adoption of petitioners' interpretation would effectively write § 6 (b)(5) out of the Act. We decline to render Congress' decision to include a feasibility requirement nugatory, thereby offending the well-settled rule that all parts of a statute, if possible, are to be given effect. *E. g., Reiter* v. *Sonotone Corp.*, 442 U. S., at 339; *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U. S. 609, 633–634 (1973); *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307–308 (1961). Congress did not contemplate any further balancing by the agency for toxic material and harmful physical agents standards, and we should not " 'impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.' " *Weinberger* v. *Hynson, Westcott & Dunning, Inc., supra*, at 631, quoting *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 489 (1947).[32]

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[31] In addition, as the legislative history makes plain, see *infra*, at 517–518, any standard that was not economically or technologically feasible would *a fortiori* not be "reasonably necessary or appropriate" under the Act. See *Industrial Union Dept.* v. *Hodgson*, 162 U. S. App. D. C. 331, 342, 499 F. 2d 467, 478 (1974) ("Congress does not appear to have intended to protect employees by putting their employers out of business").

[32] This is not to say that § 3 (8) might not require the balancing of costs and benefits for standards promulgated under provisions other than § 6 (b)(5) of the Act. As a plurality of this Court noted in *Industrial Union Dept.*, if § 3 (8) had no substantive content, "there would be no

C

The legislative history of the Act, while concededly not crystal clear, provides general support for respondents' interpretation of the Act. The congressional Reports and debates certainly confirm that Congress meant "feasible" and nothing else in using that term. Congress was concerned that the Act might be thought to require achievement of absolute safety, an impossible standard, and therefore insisted that health and safety goals be capable of economic and technological accomplishment. Perhaps most telling is the absence of any indication whatsoever that Congress intended OSHA to conduct its own cost-benefit analysis before promulgating a toxic material or harmful physical agent standard. The legislative history demonstrates conclusively that Congress was fully aware that the Act would impose real and substantial costs of compliance on industry, and believed that such costs were part of the cost of doing business. We thus turn to the relevant portions of the legislative history.

Neither the original Senate bill, S. 2193, 91st Cong., 1st Sess. (1969), introduced by Senator Williams, nor the original House bill, H. R. 16785, 91st Cong., 2d Sess. (1970), introduced by Representative Daniels, included specific provisions

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statutory criteria at all to guide the Secretary in promulgating either national consensus standards or permanent standards other than those dealing with toxic materials and harmful physical agents." 448 U. S., at 640, n. 45. Furthermore, the mere fact that a § 6 (b) (5) standard is "feasible" does not mean that § 3 (8)'s "reasonably necessary or appropriate" language might not impose additional restraints on OSHA. For example, all § 6 (b) (5) standards must be addressed to "significant risks" of material health impairment. *Id.*, at 642. In addition, if the use of one respirator would achieve the same reduction in health risk as the use of five, the use of five respirators was "technologically and economically feasible," and OSHA thus insisted on the use of five, then the "reasonably necessary or appropriate" limitation might come into play as an additional restriction on OSHA to choose the one-respirator standard. In this case we need not decide all the applications that § 3 (8) might have, either alone or together with § 6 (b) (5).

controlling the issuance of standards governing toxic materials and harmful physical agents, Leg. Hist. 1, 6–7 (Williams bill); 721, 728–732 (Daniels bill), although both contained the definitional section enacted as § 3 (8).[33] The House Committee on Education and Labor, to which the Daniels bill was referred, reported out an amended bill that included the following section:

> "The Secretary, in promulgating standards under this subsection, shall set the standard which most adequately assures, on the basis of the best available professional evidence, that no employee will suffer any impairment of health or functional capacity, or diminished life expectancy even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." H. R. Rep. No. 91–1291, p. 4 (1970) (to accompany H. R. 16785), Leg. Hist. 834.

The Senate Committee on Labor and Public Welfare, reporting on the Williams bill, included a provision virtually identical to the House version, except for the additional requirement that the Secretary set the standard "which most adequately *and feasibly assures* . . . that no employee will suffer any impairment of health." *Id.*, at 242 (the Senate provision was numbered § 6 (b)(5)) (emphasis added). This addition to the Williams bill was offered by Senator Javits, who explained his amendment:

> "As a result of this amendment the Secretary, in setting standards, is expressly required to consider feasibility of proposed standards. This is an improvement over the Daniels bill [as reported out of the House Committee], which might be interpreted to require *absolute* health and safety in all cases, regardless of feasibility, and the Administration bill, which contains no criteria for stand-

[33] Although both versions of the Act contained provisions identical to § 3 (8), 29 U. S. C. § 652 (8), there is no discussion in the legislative history of the meaning of the phrase "reasonably necessary or appropriate."

ards at all." S. Rep. No. 91–1282, p. 58 (1970), Leg. Hist. 197 (emphasis added).[34]

Thus the Senator's concern was that a standard might require "absolute health and safety" without any consideration as to whether such a condition was achievable. The full Senate Committee also noted that standards promulgated under this provision "shall represent feasible requirements," S. Rep. No. 91–1282, at 7, Leg. Hist. 147, and commented that "[s]uch standards should be directed at assuring, *so far as possible*, that no employee will suffer impaired health . . . ," *ibid.* (emphasis added).

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[34] Petitioners' primary legislative history argument is that Senator Javits "took the position that OSHA standards should be 'feasible' in the sense of being 'reasonable' and 'practical' as well as technologically achievable." Brief for Petitioners in No. 79–1429, p. 32. A review of the record belies this contention. Senator Javits himself had introduced the administration's bill, S. 2788, 91st Cong., 1st Sess. (1969), which he observed contained no criteria for issuance of standards. Leg. Hist. 31, 39–42. That proposed legislation, which established a National Occupational Safety and Health Board to promulgate standards, required the Board to submit proposed standards to an appropriate national standards-producing organization "to prepare a report on the technical feasibility, reasonableness and practicality of such standard." *Id.*, at 39. Furthermore, either the Secretary of Labor or the Secretary of Health, Education, and Welfare could object to a proposed standard on the basis, *inter alia*, that it "is not feasible," *id.*, at 40, at which point the Board could reaffirm the standard by a majority vote, *ibid.* President Nixon's message accompanying S. 2788, which Senator Javits inserted in the Congressional Record, described the "report on the technical feasibility, reasonableness and practicality of such standard" under the Act as a "report on the feasibility of the proposed standards." 115 Cong. Rec. 22517 (1969).

From this slim reed petitioners fashion their legislative history argument. But even if Senator Javits fully subscribed to statements by President Nixon on the proposed legislation, of which there is some doubt, see *id.*, at 22512, this hardly supports the view that the Senator's addition of the feasibility requirement to the Williams bill included any such baggage. After all, the Senator described his amendment only with the word "feasible," and specifically distinguished the amended Williams bill from the administration's, on the basis of the latter's lack of criteria.

The final amendments to this Senate provision, resulting in § 6 (b)(5) of the Act, were proposed and adopted on the Senate floor after the Committee reported out the bill. Senator Dominick, who played a prominent role in this amendment process, see 116 Cong. Rec. 37631 (1970), Leg. Hist. 526 (comments of Sen. Javits); 116 Cong. Rec., at 37631, Leg. Hist. 527 (comments of Sen. Williams), continued to be concerned that the Act might be read to require absolute safety. He therefore proposed that the entire first sentence of § 6 (b)(5) be struck, explaining:

> "This requirement is inherently confusing and unrealistic. It could be read to require the Secretary to ban all occupations in which there remains *some* risk of injury, impaired health, or life expectancy. In the case of all occupations, it will be impossible to eliminate all risks to safety and health. Thus, the present criteria could, if literally applied, close every business in this nation. In addition, in many cases, the standard which might most 'adequately' and 'feasibly' assure the elimination of the danger would be the prohibition of the occupation itself." Leg. Hist. 367 (comments of Sen. Dominick on his proposed amendment No. 1054) (emphasis in original).

In the ensuing floor debate on this issue, Senator Dominick reiterated his concern that "[i]t is unrealistic to attempt, as [the Committee's § 6 (b)(5)] apparently does, to establish a utopia free from any hazards. Absolute safety is an impossibility . . . ." 116 Cong. Rec. 37614 (1970), Leg. Hist. 480.[35] The Senator concluded: "Any administrator re-

[35] Senator Dominick gave several examples. For instance:

"[L]et us take a fellow who is a streetcar conductor or a bus conductor at the present time. How in the world, in the process of the pollution we have in the streets or in the process of the automobile accidents that we have all during a working day of anyone driving a bus or trolley car, or whatever it may be, can we set standards that will make sure he will not have any risk to his life for the rest of his life? It is totally impossible for

sponsible for enforcing the statute will be faced with an impossible choice. Either he must forbid employment in all occupations where there is any risk of injury, even if the technical state of the art could not remove the hazard, or he must ignore the mandate of Congress . . . ." 116 Cong. Rec., at 37614, Leg. Hist. 481–482.

Senator Dominick failed in his efforts to have the first sentence of § 6 (b)(5) deleted. However, after working with Senators Williams and Javits, he introduced an amended version of the first sentence which he thought was "agreeable to all" and which became § 6 (b)(5) as it now appears in the Act. 116 Cong. Rec., at 37622, Leg. Hist. 502. This amendment limited the applicability of § 6 (b)(5) to "toxic materials and harmful physical agents," changed "health impairment" to "material impairment of health," and deleted the reference to "diminished life expectancy." Significantly, the feasibility requirement was left intact in the statute. Instead of the phrase "which most adequately and feasibly assures," the amendment merely substituted "which most adequately assures, to the extent feasible," to emphasize that the feasibility requirement operated as a limit on the promulgation of standards under § 6 (b)(5).

Senator Dominick believed that his modifications made clearer that attainment of an absolutely safe working environment could not be achieved through "prohibition of the occupation itself," Leg. Hist. 367, and that toxic material and harmful physical agent standards should not address frivolous harms that exist in every workplace. The feasibility requirement, along with the need for a "*material* impairment of health," were thus thought to satisfy these two concerns. He explained the effect of the amendment:

"What we were trying to do in the bill—unfortunately,

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this to be put in a bill; and yet it is in the committee bill." 116 Cong. Rec. 37337 (1970), Leg. Hist. 423. See also 116 Cong. Rec., at 37614, 36522, Leg. Hist. 481, 345.

> we did not have the proper wording or the proper drafting—was to say that when we are dealing with toxic agents or physical agents, we ought to take such steps as are feasible and practical to provide an atmosphere within which a person's health or safety would not be affected. Unfortunately, we had language providing that anyone would be assured that no one would have a hazard . . . ." 116 Cong. Rec. 37622 (1970), Leg. Hist. 502.

Senator Williams added that the amendment "will provide a continued direction to the Secretary that he shall be required to set the standard which most adequately and to the greatest extent feasible assures" that no employee will suffer any material health impairment. 116 Cong. Rec., at 37622, Leg. Hist. 503. The Senate thereafter passed S. 2193. One week later, the House passed a substitute bill which failed to contain any substantive criteria for the issuance of health standards in place of its original bill. 116 Cong. Rec., at 38716–38717, Leg. Hist. 1094–1096. At the joint House-Senate Conference, however, the House conferees acceded to the Senate's version of § 6 (b)(5).[36]

Not only does the legislative history confirm that Congress meant "feasible" rather than "cost-benefit" when it used the former term, but it also shows that Congress understood that

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[36] In acceding, the House obtained Senate agreement to another amendment, now § 6 (b)(6)(A) of the Act, that allowed employers to petition for a temporary variance from an occupational safety and health standard in certain cases, except that "[e]conomic hardship is not to be a consideration for the qualification for a temporary extension order." H. R. Conf. Rep. No. 91-1765, p. 35 (1970), Leg. Hist. 1188. The Conference Report limited the variance procedure to the following cases:

"unavailability of professional or technical personnel or of necessary materials or equipment or because necessary construction or alteration of facilities cannot be completed on time. . . . Such an order may be issued for a maximum period of one year and may not be renewed more than twice." *Ibid.*

the Act would create substantial costs for employers, yet intended to impose such costs when necessary to create a safe and healthful working environment.[37] Congress viewed the costs of health and safety as a cost of doing business. Senator Yarborough, a cosponsor of the Williams bill, stated: "We know the costs would be put into consumer goods but that is the price we should pay for the 80 million workers in America." 116 Cong. Rec., at 37345, Leg. Hist. 444. He asked:

> "One may well ask too expensive for whom? Is it too expensive for the company who for lack of proper safety equipment loses the services of its skilled employees? Is it too expensive for the employee who loses his hand or leg or eyesight? Is it too expensive for the widow trying to raise her children on meager allowance under workmen's compensation and social security? And what about the man—a good hardworking man—tied to a wheel chair or hospital bed for the rest of his life? That

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[37] Because the costs of compliance would weigh particularly heavily on small businesses, Congress provided in § 28 of the Act an amendment to the Small Business Act, 15 U. S. C. § 636, making small businesses eligible for economic assistance through the Small Business Administration to comply with standards promulgated by the Secretary. 84 Stat. 1618, Leg. Hist. 1257. Senator Dominick explained:

"There is a provision in the bill which recognizes the impact that this particular legislation may have on small businesses. . . . It permits the Secretary to make loans to small businesses wherever the standards that are set by the National Government are so severe as to have caused a real and substantial economic injury. Under those circumstances the Secretary is entitled, through the Small Business Administration, to make loans to those businesses to get them over the hump, because of the need for new equipment, or because of new conditions within the shop, which would permit them to continue in operation.

"I think that is a very significant and important provision for minimizing economic injury which could occur if the bill resulted in situations which would have very serious effects on businesses." 116 Cong. Rec. 37631 (1970), Leg. Hist. 525.

is what we are dealing with when we talk about industrial safety.

. . . . .

"We are talking about people's lives, not the indifference of some cost accountants." 116 Cong. Rec., at 37625, Leg. Hist. 510.

Senator Eagleton commented that "[t]he costs that will be incurred by employers in meeting the standards of health and safety to be established under this bill are, in my view, *reasonable and necessary costs of doing business.*" 116 Cong. Rec., at 41764, Leg. Hist. 1150–1151 (emphasis added).[38]

Other Members of Congress voiced similar views.[39] Nowhere is there any indication that Congress contemplated a different balancing by OSHA of the benefits of worker health and safety against the costs of achieving them. Indeed Congress thought that the *financial costs* of health and safety problems in the workplace were as large as or larger than the *financial costs* of eliminating these problems. In its statement

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[38] Congress was concerned that some employers not obtain a competitive advantage over others by declining to invest in worker health and safety:

"Although many employers in all industries have demonstrated an exemplary degree of concern for health and safety in the workplace, their efforts are too often undercut by those who are not so concerned. Moreover, the fact is that many employers—particularly smaller ones—simply cannot make the necessary investment in health and safety, and survive competitively, unless all are compelled to do so." S. Rep. 91–1282, p. 4 (1970), Leg. Hist. 144.

[39] See, *e. g.*, 116 Cong. Rec. 38386 (1970), Leg. Hist. 1030–1031 (remarks of Cong. Dent):

"Although I am very much disturbed over adding new costs to the operation of our production facilities because of the threats from abroad, I would say there is a greater concern and that must be for the production men who do the producing—the men who work in the service industries and the men and women in this country who daily go out and keep the economy moving and make it safe for all of us to live and to work and to be able to prosper in it."

of findings and declaration of purpose encompassed in the Act itself, Congress announced that "personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments." 29 U. S. C. § 651 (a). The Senate was well aware of the magnitude of these costs:

> "[T]he economic impact of industrial deaths and disability is staggering. Over $1.5 billion is wasted in lost wages, and the annual loss to the Gross National Product is estimated to be over $8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical expenses." S. Rep. No. 91–1282, p. 2 (1970), Leg. Hist. 142.

Senator Eagleton summarized: "Whether we, as individuals, are motivated by simple humanity or by simple economics, we can no longer permit profits to be dependent upon an unsafe or unhealthy worksite." 116 Cong. Rec. 41764 (1970), Leg. Hist. 1150–1151.

III

Section 6 (f) of the Act provides that "[t]he determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." 29 U. S. C. § 655 (f). Petitioners contend that the Secretary's determination that the Cotton Dust Standard is "economically feasible" is not supported by substantial evidence in the record considered as a whole. In particular, they claim (1) that OSHA underestimated the financial costs necessary to meet the Standard's requirements; and (2) that OSHA incorrectly found that the Standard would not threaten the economic viability of the cotton industry.

In statutes with provisions virtually identical to § 6 (f) of the Act, we have defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp.* v. *NLRB*,

340 U. S. 474, 477 (1951). The reviewing court must take into account contradictory evidence in the record, *id.*, at 487–488, but "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence," *Consolo* v. *FMC*, 383 U. S. 607, 620 (1966). Since the Act places responsibility for determining substantial evidence questions in the courts of appeals, 29 U. S. C. § 655 (f), we apply the familiar rule that "[t]his Court will intervene only in what ought to be the rare instance when the [substantial evidence] standard appears to have been misapprehended or grossly misapplied" by the court below. *Universal Camera Corp.* v. *NLRB*, *supra*, at 491; see *Mobil Oil Corp.* v. *FPC*, 417 U. S. 283, 292, 310 (1974); *FTC* v. *Standard Oil Co.*, 355 U. S. 396, 400–401 (1958). Therefore, our inquiry is not to determine whether we, in the first instance, would find OSHA's findings supported by substantial evidence. Instead we turn to OSHA's findings and the record upon which they were based to decide whether the Court of Appeals "misapprehended or grossly misapplied" the substantial evidence test.

A

OSHA derived its cost estimate for industry compliance with the Cotton Dust Standard after reviewing two financial analyses, one prepared by the Research Triangle Institute (RTI), an OSHA-contracted group, the other by industry representatives (Hocutt-Thomas).[40] The agency carefully

[40] See RTI, Cotton Dust: Technological Feasibility Assessment and Final Inflationary Impact Statement (1976), Ex. 6–76, Ct. of App. J. A. 457, 573–748; RTI, Technological Feasibility and Economic Impact of Regulations for Cotton Dust: Testimony to be Presented by the Research Triangle Institute at Public Hearing (1977), Ex. 16, *id.*, at 1320, 1351–1357. The industry estimates were presented by Hovan Hocutt and Arthur Thomas, employees of dust control equipment manufacturers. Statement of Hovan Hocutt, Senior Vice President, Engineering, Pneumafil Corp., Ex. 60, *id.*, at 2228–2247; Statement of Arthur Thomas, Senior Vice Presi-

explored the assumptions and methodologies underlying the conclusions of each of these studies. From this exercise the agency was able to build upon conclusions from each which it found reliable and explain its process for choosing its cost estimate. A brief summary of OSHA's treatment of the two studies follows.

OSHA rejected RTI's cost estimate of $1.1 billion for textile industry engineering controls for three principal reasons.[41] First, OSHA believed that RTI's estimate should be discounted by 30%, 43 Fed. Reg. 27372, col. 3 (1978), because that estimate was based on the assumption that engineering controls would be applied to all equipment in mills, including those processing pure synthetic fibers, even though cotton dust is not generated by such equipment. RTI had observed that "[e]xclusion of equipment processing man-made fibers only could reduce these costs by as much as 30 percent." Ex. 6–76, Ct. of App. J. A. 585.[42] Since the Standard did not require controls on synthetics-only equipment, OSHA rejected RTI's assumption about application of controls to synthetics-only machines. 43 Fed. Reg. 27371, col. 3 (1978). Second, OSHA concluded that RTI "may have over-estimated compliance costs since some operations are already in compliance with the permissible exposure limit of the new standard." *Id.*, at 27370, cols. 2 and 3. Evidence indicated that some

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dent, The Bahnson Co., Ex. 62, *id.*, at 2248–2257. OSHA referred collectively to these two statements as the Hocutt-Thomas estimate.

[41] RTI estimated compliance costs of $984.4 million for yarn production (opening through spinning), Ex. 6–76, *id.*, at 473, and $127.7 million for yarn processing (winding through weaving/slashing), *id.*, at 600. In another part of its study, RTI estimated yarn production costs of $885.6 million. *Id.*, at 589. The explanation for this discrepancy is not readily apparent from the record, although it may be attributable to cost estimates for different years.

[42] RTI made what it called a "conservative estimate" that "controls would be applied to all the production equipment in mills processing cotton and cotton-synthetic blends, even if part of their product is pure synthetic." *Id.*, at 585.

mills had attained PEL's of 200 $\mu g/m^3$ or less, while others were below the 1,000 $\mu g/m^3$ total dust level.[43] Therefore, OSHA disagreed with RTI's assumption that the industry had not reduced cotton dust exposure below the existing standard's 1,000 $\mu g/m^3$ total dust PEL. *Id.*, at 27370, col. 3. Third, OSHA found that the RTI study suffered from lack of recent accurate industry data. *Id.*, at 27373, col. 1; see Ex. 6–76, Ct. of App. J. A. 858; Ex. 16., *id.*, at 1357, 1359.

In light of these deficiencies in the RTI study, OSHA adopted the Hocutt-Thomas estimate for textile industry engineering controls of $543 million,[44] emphasizing that, because it was based on the most recent industry data, it was more realistic than RTI's estimate. 43 Fed. Reg. 27373, col. 1 (1978).[45] Nevertheless OSHA concluded that the Hocutt-

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[43] RTI's David LeSourd explained that RTI did not have data on the degree of compliance for the industry as a whole, but only for some specific mills. *Id.*, at 3637–3638. Therefore RTI merely assumed that industrywide PEL's were at a 1,000 $\mu g/m^3$ total dust PEL. Ex. 6–76, *id.*, at 579–580. The record contains conflicting evidence on the actual level of control in the industry. Some evidence suggests compliance by mills substantially better than the 1,000 $\mu g/m^3$ total dust level. See, *e. g.*, Ex. 47, *id.*, at 2037 (66% of Burlington Industries work areas at or below 500 $\mu g/m^3$, 28% below 200 $\mu g/m^3$); Ex. 78, *id.*, at 2387. One expert, commenting on another study, observed that "substantial proportions of the industry are, in fact, within compliance of [200 $\mu g/m^3$]." *Id.*, at 3637. Other evidence in the record suggests that some segments of the industry are not in compliance with the 1,000 $\mu g/m^3$ total dust PEL. See, *e. g.*, *id.*, at 3939 (criticizing RTI assumption of compliance). In any event, OSHA found that the "actual level of controls in the cotton industry could not be determined" on the basis of data available to RTI at the time of its study. 43 Fed. Reg. 27370, col. 3 (1978).

[44] OSHA's cost estimate included $543 million for engineering controls (the Hocutt-Thomas estimate), $7 million for monitoring, medical surveillance, and other provisions (the RTI estimate), $31.5 million for waste processing, and $75 million for seed processing, for a total of $656.5 million. *Id.*, at 27380, col. 1.

[45] The Hocutt-Thomas study based its estimates on data obtained from a recent ATMI survey of cotton mills. Completed questionnaires from

Thomas estimate was overstated for four principal reasons. First, Hocutt-Thomas included costs of achieving the existing PEL of 1,000 $\mu g/m^3$, while OSHA thought it likely that compliance was more widespread and that some mills had in fact achieved the final standard's PEL. *Ibid.*; see n. 43, *supra*.[46] Second, Hocutt-Thomas declined to make any allowance for the trend toward replacement of existing production machines with newer more productive equipment.[47] Relying on this "[n]atural production tren[d]," 43 Fed. Reg. 27359, col. 1 (1978), OSHA concluded that fewer machines than estimated by Hocutt-Thomas would require retrofitting or other con-

353 mills, which processed 80% of the cotton bales in the United States, were returned. Ex. 60, Ct. of App. J. A. 2231.

[46] The Hocutt-Thomas study included an allowance for existing compliance efforts, by subtracting from its total estimate the cost of all engineering controls purchased by the industry prior to February 11, 1977. *Id.*, at 2232, 2247. Whether this is a sufficient proxy for current industry compliance is not apparent from the record. Hocutt himself admitted that he did not have figures on what portion of the industry was meeting the 1,000 $\mu g/m^3$ total dust PEL. *Id.*, at 3941.

[47] John Figh, a vice president at Chase Manhattan Bank specializing in the textile industry, commented on the trend toward modernizing equipment in the mills:

"[B]y *continuing* to upgrade plants with the most modern and efficient equipment, the textile manufacturing industry will likely not be required due to demand to add much in the way of new bricks and mortar. There may be some individual cases of out-of-date facilities being replaced by new buildings; but for the most part, I believe we will see *more* in the way of modernization of existing plants . . . ." Ex. 63, *id.*, at 2260 (emphasis added).

One study explained why the costs of controls should be lower if a mill converts to new equipment as opposed to retrofitting old machines:

"1) The operating cost of new equipment with controls on that equipment is less than the operating cost of the old equipment with controls necessary for the older, slower equipment to meet proscribed [*sic*] dust levels; and 2) by going to newer equipment with controls there is a likelihood that increased production rates will result in recovery of some or all of the capital cost of control." Ex. 79A, *id.*, at 2532; see Ex. 79C, *id.*, at 2550–2551; Ex. 63, *id.*, at 2261; Ex. 78, *id.*, at 2376–2377.

trols, *id.*, at 27372, col. 3. Third, OSHA thought that Hocutt-Thomas failed to take into account development of new technologies likely to occur during the 4-year compliance period. *Ibid.*[48] Fourth, OSHA believed that Hocutt-Thomas might have improperly included control costs for synthetics-only machines, *ibid.*, an inclusion which could result in a 30% cost overestimate.[49]

Petitioners criticize OSHA's adoption of the Hocutt-Thomas estimate, since that estimate was based on achievement of somewhat less stringent PEL's than those ultimately promulgated in the final Standard.[50] Thus, even if the Hocutt-Thomas estimate was exaggerated, they assert that "only by the most remarkable coincidence would the amount of that overestimate be equal to the additional costs required to attain the far more stringent limits of the Standard OSHA actually adopted." Brief for Petitioners in No. 79–1429, p. 27; see Brief for Petitioner in No. 79–1583, pp. 14–15. The agency itself recognized the problem cited by petitioners, but found itself limited in the precision of its estimates by the

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[48] Chase Manhattan Bank vice president Figh noted that "[t]here does not appear to be any vast new technology on the horizon," but that "[a]s for new machinery, evolutionary changes are continuing at what appears to me to be about the same rate as in the last few years." Ex. 63, *id.*, at 2260–2261. One study is particularly critical of the assumption of a "static state of technology," Ex. 78, *id.*, at 2380, and documents technological advances that can be expected, *id.*, at 2380–2386. Some experts were less optimistic of the role of technology. See, *e. g.*, *id.*, at 3643–3644 (RTI study).

[49] Hocutt-Thomas had some information on the "ratio of synthetics to cotton in blends" in the mills, but it is not clear from the record if and how they used this information. Ex. 60, *id.*, at 2230.

[50] The final Cotton Dust Standard calls for PEL's of 200 $\mu g/m^3$ in opening through roving and spinning through warping, and 750 $\mu g/m^3$ for slashing and weaving. The Hocutt-Thomas study similarly assumed a 200 $\mu g/m^3$ PEL for opening through roving, but assumed less stringent PEL's of 500 $\mu g/m^3$ for spinning through warping, and 1,000 $\mu g/m^3$ for slashing and weaving.

industry's refusal to make more of its own data available.[51] OSHA explained that, "in the absence of the [industry] survey data [of textile mills], OSHA cannot develop more accurate estimates of compliance costs." 43 Fed. Reg. 27373, col. 1 (1978). Since § 6 (b)(5) of the Act requires that the Secretary promulgate toxic material and harmful physical agent standards "on the basis of the best available evidence," 29 U. S. C. § 655 (b)(5), and since OSHA could not obtain the more detailed confidential industry data it thought essential to further precision, we conclude that the agency acted reasonably in adopting the Hocutt-Thomas estimate.[52] While

[51] For example, in questioning before an Administrative Law Judge, Hocutt answered:

"Well, I'm beginning to wish I hadn't said anything about this, which I did, and I have to be helpful. Practically all of this information that I have is confidential and I couldn't reveal any of the sources. You can only take my word for the figures. I can't substantiate it in any manner." *Id.*, at 3929.

Petitioners note, however, that the industry subsequently provided its survey data to OSHA, and that the only information deleted was confidential information withheld by agreement with the agency in order to prevent identification of specific mills. Reply Brief for Petitioners in No. 79–1429, p. 23, n. 32; see App. 388–390. OSHA responds that, "[b]ecause the number of machines was deleted and correlated dust data were not supplied, the data could not be used to support a specific cost adjustment." Brief for Federal Respondent 64, n. 70. In any event, no contention is made that OSHA had access to Hocutt's own data used to calculate his cost estimate.

[52] Both petitioners and respondents attempt their own calculations from evidence in the record to show the unreasonableness or reasonableness of OSHA's rough equation between the Hocutt-Thomas overstatement in costs and the expense of achieving a standard somewhat more stringent for some operations. See, *e. g.*, Brief for Petitioner in No. 79–1583, pp. 9–10; Brief for Union Respondents 14–18. Such manipulation of the data suggests a wide margin of error for any estimate, whether it be OSHA's, the industry's, or the unions'. Viewed in that light, the agency's candor in confessing its own inability to achieve a more precise estimate should not precipitate a judicial review that nonetheless demands what the congressionally delegated "expert" says it cannot provide.

a cost estimate based on the standard actually promulgated surely would be preferable,[53] we decline to hold as a matter of law that its absence under the circumstances required the Court of Appeals to find that OSHA's determination was unsupported by substantial evidence.[54]

Therefore, whether or not in the first instance we would find the Secretary's conclusions supported by substantial evidence, we cannot say that the Court of Appeals in this case

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[53] The Secretary originally asked RTI to prepare cost estimates for several PEL levels, including 500, 200, and 100 $\mu g/m^3$. Ex. 6–76, Ct. of App. J. A. 509. Clearly the Secretary intended to have cost information on the different PEL's that he might promulgate. Although RTI provided estimates for these levels in its final report, OSHA found them to be too unreliable to adopt as final estimates. See *supra*, at 524–525.

Even if the Secretary had wanted to obtain a cost estimate based on confidential industry data for the actual PEL's in the adopted Standard, he would have been unable to do so. Hocutt had concluded that it was technologically impractical to achieve PEL's below 500 $\mu g/m^3$ for the operations of spinning through warping, Ex. 60, Ct. of App. J. A. 2239–2241, and PEL's below 1,000 $\mu g/m^3$ for weaving and slashing, *id.*, at 2241–2243. Therefore, he declined to prepare cost estimates of a 200 $\mu g/m^3$ PEL for those operations. The Secretary obviously disagreed with his judgment of technological feasibility. We also note that, although petitioners challenged the technological feasibility of the final Cotton Dust Standard in the Court of Appeals, they have abandoned such challenge here. Brief for Petitioners in No. 79–1429, p. 8, n. 16.

[54] The Court of Appeals observed that "the agency's underlying cost estimates are not free from imprecision," 199 U. S. App. D. C., at 80, 617 F. 2d, at 662, but that "[t]he very nature of economic analysis frequently imposes practical limits on the precision which reasonably can be required of the agency," *id.*, at 79, 617 F. 2d, at 661. We suspect that this results not only from the difficulty of obtaining accurate data, but also from the inherent crudeness of estimation tools. Of necessity both the RTI and Hocutt-Thomas studies had to rely on assumptions the truth or falsity of which could wreak havoc on the validity of their final numerical cost estimates. As the official charged by Congress with the promulgation of occupational safety and health standards that protect workers "to the extent feasible," the Secretary was obligated to subject such assumptions to careful scrutiny, and to decide how they might affect the correctness of the proffered estimates.

"misapprehended or grossly misapplied" the substantial evidence test when it found that "OSHA reasonably evaluated the cost estimates before it, considered criticisms of each, and selected suitable estimates of compliance costs." 199 U. S. App. D. C., at 79, 617 F. 2d, at 661 (footnote omitted).

B

After estimating the cost of compliance with the Cotton Dust Standard, OSHA analyzed whether it was "economically feasible" for the cotton industry to bear this cost.[55] OSHA

[55] In one of their questions presented, petitioners ATMI et al. ask whether "the statutory requirement that compliance with an OSHA standard must be 'economically feasible' can be satisfied merely by the agency's conclusion that the standard will not put the affected industry out of business." Pet. for Cert. in No. 79–1429, p. 2. However, in argument in their brief, petitioners appear to treat this issue primarily as a substantial evidence question. See Brief for Petitioners in No. 79–1429, pp. 24–31. They finally summarize their position as follows:

"OSHA must present a responsible prediction, supported by substantial evidence, of what its standard will cost and what impact it will have on such factors as production, employment, competition, and prices. And the agency must explain in a cogent manner—on the basis of intelligible criteria—why it concludes that a standard having such an economic impact is 'feasible.'" *Id.*, at 35 (footnote omitted).

As our review of OSHA's economic feasibility determination demonstrates, OSHA presented a "responsible prediction" of what its Standard would cost and its impact on "production, employment, competition, and prices." The agency concluded that its Standard is feasible because "compliance with [it] is well within the financial capability of the covered industries." 43 Fed. Reg. 27379, col. 3 (1978). OSHA also found that the industry "will be able to meet the demands for production of cotton products." *Id.*, at 27378, col. 2. We take these findings to mean, as the Secretary suggests, that "[a]t bottom, the Secretary must [and did] determine that the industry will maintain long-term profitability and competitiveness." Brief for Federal Respondent 49. See also *United Steelworkers of America* v. *Marshall*, 208 U. S. App. D. C. 60, 136, 647 F. 2d 1189, 1265 (1981) ("the practical question is whether the standard threatens the competitive stability of an industry"); *Industrial Union Dept.* v. *Hodgson*, 162 U. S. App. D. C., at 342, 499 F. 2d, at 478. This interpretation by the Secretary is certainly consistent with the plain meaning of the word "feasible." See

concluded that it was, finding that "although some marginal employers may shut down rather than comply, the industry as a whole will not be threatened by the capital requirements of the regulation." 43 Fed. Reg. 27378, col. 2 (1978); see *id.*, at 27379, col. 3 ("compliance with the standard is well within the financial capability of the covered industries"). In reaching this conclusion on the Standard's economic impact, OSHA made specific findings with respect to employment, energy consumption, capital financing availability, and profitability. *Id.*, at 27377–27378. To support its findings, the agency relied primarily on RTI's comprehensive investigation of the Standard's economic impact.[56]

RTI evaluated the likely economic impact on the cotton industry and the United States' economy of OSHA's original proposed standard, an across-the-board 200 $\mu g/m^3$ PEL. Ex. 6–76, Ct. of App. J. A. 626.[57] RTI had estimated a total

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Industrial Union Dept. v. *American Petroleum Institute,* 448 U. S., at 717–718, n. 30 (MARSHALL, J., dissenting). Therefore, these cases do not present, and we do not decide, the question whether a standard that threatens the long-term profitability and competitiveness of an industry is "feasible" within the meaning of § 6 (b)(5) of the Act, 29 U. S. C. § 655 (b)(5).

[56] In contrast to the compliance cost estimates prepared by RTI, OSHA did not find any major flaws with RTI's study of the economic impact of compliance costs.

[57] RTI specifically analyzed the impact of the Standard on the following areas in the cotton industry:

"1) Additional employment requirements.

"2) Energy consumption.

"3) Increases in production costs and consequent price increases by affected industries.

"4) Capital requirements and capital financing problems.

"5) Competition effects on profit and market structure.

"6) Inflationary impact on consumers and U. S. economy.

"7) Employment impact due to the contraction of output demand." Ex. 6–76, Ct. of App. J. A. 626.

RTI also examined the economic impact of two other across-the-board PEL's of 500 $\mu g/m^3$ and 100 $\mu g/m^3$. *Ibid.*

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compliance cost of $2.7 billion for a 200 $\mu g/m^3$ PEL,[58] and used this estimate in assessing the economic impact of such a standard. *Id.*, at 736–737. As described in n. 44, *supra*, OSHA estimated total compliance costs of $656.5 million for the final Cotton Dust Standard,[59] a standard less stringent than the across-the-board 200 $\mu g/m^3$ PEL of the proposed standard. Therefore, the agency found that the economic impact of its Standard would be "much less severe" than that suggested by RTI for a 200 $\mu g/m^3$ PEL estimate of $2.7 billion. 43 Fed. Reg. 27378, col. 2 (1978). Nevertheless, it is instructive to review RTI's conclusions with respect to the economic impact of a $2.7 billion cost estimate. RTI found:

> "Implementation of the proposed [200 $\mu g/m^3$] standard will require adjustments within the cotton textile industry that will take time to work themselves out and that may be difficult for many firms. In time, however, prices may be expected to rise and markets to adjust so that revenues will cover costs. Although the impact on any one firm cannot be specified in advance, nothing in the RTI study indicates that the cotton textile industry as a whole will be seriously threatened by the impact of the proposed standard for control of cotton dust exposure." Ex. 16, Ct. of App. J. A. 1380; *id.*, at 3620.

In reaching this conclusion, RTI analyzed the total and annual economic impact[60] on each of the different sectors of the cotton industry.

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[58] This cost estimate included $984.4 million for yarn production (opening through spinning), $1,387.9 billion for winding through weaving/slashing, $292.2 million for cotton ginning, and $32 million for waste processing. *Id.*, at 737.

[59] Cotton ginning was the subject of a separate regulation not at issue here. 43 Fed. Reg. 27350, col. 1 (1978); see 29 CFR § 1910.1046 (1980).

[60] RTI's annual cost-of-compliance figure contained three components: an annualized capital charge, direct operating cost, and energy cost. Ex. 6–76, Ct. of App. J. A. 643. The annualized capital charge consisted of depreciation, interest, administrative overhead, property tax, and in-

For example, in yarn production (opening through spinning), RTI found that the total additional capital requirement per dollar of industry shipment was 7.8 cents, and that the corresponding annual requirement was 1.9 cents. Ex. 6–76, *id.*, at 729. Average price increases necessary to maintain prestandard rates of return on investment were estimated to range from 0.22 cents to 6.25 cents per dollar of industry sales.[61] *Ibid.* Even assuming no price increases, only one of the six yarn-producing operations would experience a negative rate of return on investment, while the five other rates of return would range from 1.4% to 3.9%. *Id.*, at 652.[62]

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surance. *Ibid.* Depreciation and interest were computed "by use of a capital recovery factor based upon the concept of capital rent, the value of which depends on the operating life of the equipment and the market interest rate." *Ibid.*

[61] Petitioners' primary criticism of OSHA's reliance on the RTI study derives from their disagreement with RTI's assumption that compliance costs would be passed on to the consumers. Brief for Petitioners in No. 79–1429, pp. 28–29. This characterization misstates RTI's position. In calculating price increases necessary to maintain prestandard rates of return, RTI "decided to adopt an extreme assumption of zero price demand elasticity in computing post-control price increases" because of difficulties in obtaining data necessary to compute elasticities for cotton yarns. Ex. 6–76, Ct. of App. J. A. 657. However, RTI carefully tested this assumption to determine "how much bias" it would introduce into the analysis. *Id.*, at 657–659. RTI concluded that, "unless the true demand elasticity for the output of the given sector is substantially greater than unity, our impact analysis based on the assumption of zero price elasticity of demand would not be invalidated." *Id.*, at 659. Therefore, unless a 1% increase in price was met with substantially more than a 1% decrease in demand, RTI's estimates of the price increases necessary to maintain prestandard rates of return were valid. Since there was no evidence suggesting such an effect, RTI proceeded with its assumption.

In any event, RTI subsequently investigated short-term price elasticities of demand for 25 cotton consumer products, finding that 19 of them had elasticities less than or equal to unity. *Id.*, at 681.

[62] RTI found higher price increases and lower rates of return when framing its analysis in pounds of cotton yarn produced. See *id.*, at 654, 729–730.

RTI estimated the average prestandard rate of return for the yarn-producing sector as 4.1%. *Ibid.*

Through an output demand elasticity analysis, RTI determined that price increases necessitated by the 200 $\mu g/m^3$ standard would result in a 1.68% contraction of cotton yarn consumption.[63] *Id.*, at 685; see *id.*, at 680–687. RTI also discussed the effects of such price increases on interfiber and domestic/foreign competition. RTI observed that "non-price factors have probably dominated" the competition between cotton and manmade fibers. *Id.*, at 623, 948–953.[64] Noting that international trade agreements restricting foreign imports of textile products "have tended to smother the effects of a small change in the relative prices of domestic versus foreign textile products," *id.*, at 622, RTI concluded that such small

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[63] Petitioner National Cotton Council of America criticizes RTI's use of short-term price elasticity coefficients, claiming that this underestimates long-term demand responses to price increases. Brief for Petitioner in No. 79–1583, pp. 16–17. However, RTI's Dr. Lee, who conducted the elasticity analysis, observed that he used two independent procedures to compute demand contraction, and only one relied on short-term price elasticities. Ct. of App. J. A. 3626–3627. His "main procedure [was] input output table procedures," which produced an even smaller demand contraction estimate than those calculations relying on the short-term coefficients. *Ibid.*

[64] RTI cited such nonprice factors as "research expenditures, promotion and advertising, fiber and fabric development, fiber properties, and care characteristics of fabric." Ex. 6–76, *id.*, at 623. John Figh, Chase Manhattan Bank vice president, observed that "polyester has grown at the expense of cotton over the last 10 years and I think it has penetrated most of the markets it can penetrate. . . . [T]he majority of it, the growth of polyster at the expense of cotton, has been completed." App. 474–475. He noted that some cotton products, such as towels and 100%-cotton men's shirts, enjoy the support of consumer preferences. *Ibid.* Although RTI cited the energy crisis without detailing its possible impact on manmade fiber products, Ex. 6–76, Ct. of App. J. A. 948, OSHA observed that changes in petroleum prices, a key ingredient in synthetic products, may have important impacts on the competitive balance, see 43 Fed. Reg. 27370, col. 2 (1978).

changes have had "very little impact" on domestic industries and markets, *id.*, at 961; see *id.*, at 954–961. In order to measure the ability of different sized textile companies to finance compliance costs, RTI constructed a ratio of capital requirements to profit after taxes. RTI found that two of the six yarn production operations would have financing difficulties, but that such difficulties decreased as company size increased. *Id.*, at 730.[65] Finally, impacts on energy costs, employment, inflation, and market structure were evaluated. See *id.*, at 728–731.[66]

Relying on its comprehensive economic evaluation of the cotton industry's ability to absorb the $2.7 billion compliance cost of a 200 $\mu g/m^3$ PEL standard, RTI concluded that "nothing in the RTI study indicates that the cotton textile industry as a whole will be seriously threatened." Ex. 16, *id.*, at 1380.[67] Therefore, it follows *a fortiori* that OSHA's

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[65] Two of the six yarn production operations had ratios less than 1, two had ratios less than 2, and the remaining two were less than 6. Ex. 6–76, Ct. of App. J. A. 665. Chase Manhattan Bank's John Figh agreed with RTI's assessment that financing the $2.7 billion compliance cost for a 200 $\mu g/m^3$ PEL standard would be most difficult for smaller textile companies. Ex. 63, *id.*, at 2264–2265.

[66] RTI conducted similar economic impact analyses, although in less depth, for the twisting through weaving and waste-processing sectors of the cotton industry covered by the proposed 200 $\mu g/m^3$ PEL standard. Ex. 6–76, *id.*, at 462. RTI found, for example, that price increases per dollar of industry sales ranged from 0.5 cents to 18 cents for twisting through weaving operations, and that some of these operations would experience "severe" financing difficulties. *Id.*, at 733–734. To recount in further detail these conclusions would be an irrelevant exercise. RTI calculated that a 200 $\mu g/m^3$ standard for weaving/slashing would cost $1.259 billion, *id.*, at 600, and computed the economic impact based on that figure. But RTI had also estimated that compliance costs for a 500 $\mu g/m^3$ PEL would be zero. *Ibid.* Since the final Cotton Dust Standard sets a 750 $\mu g/m^3$ PEL for weaving/slashing, further review of RTI's conclusion with respect to its $1.259 billion cost is particularly unnecessary.

[67] Petitioners note that, although RTI estimated that compliance with the Cotton Dust Standard would take eight or more years, OSHA required

estimated compliance cost of $656.6 million is "economically feasible." [68] Even if OSHA's estimate was understated, we are fortified in observing that RTI found that a standard more than four times as costly was nevertheless economically feasible.

The Court of Appeals found that the agency "explained the economic impact it projected for the textile industry," and that OSHA has "substantial support in the record for its . . . findings of economic feasibility for the textile industry." 199 U. S. App. D. C., at 80, 617 F. 2d, at 662. On the basis of the whole record, we cannot conclude that the Court of Appeals "misapprehended or grossly misapplied" the substantial evidence test.

IV

The final Cotton Dust Standard places heavy reliance on the use of respirators to protect employees from exposure to cotton dust, particularly during the 4-year interim period necessary to install and implement feasible engineering controls.[69] One part of the respirator provision requires the

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compliance within four years. Brief for Petitioners in No. 79–1429, p. 29. RTI chose an 8-year period primarily because of "problems the control industry may have in supplying the required equipment." App. 415; see *id.*, at 415–416. If this proves to be the case, then presumably individual mills will be able to obtain variances from the Standard's requirements because of technological infeasibility. See 29 CFR § 1910.1043 (e) (1) (1980); 29 U. S. C. § 655 (b).

[68] Perhaps in light of this fact, neither petitioners ATMI et al. nor petitioner National Cotton Council of America frame their "economic impact" substantial evidence arguments based on OSHA's estimate of compliance costs. Instead, they adopt as a minimum RTI's $2.7 billion estimate for compliance costs with the proposed standard's 200 $\mu g/m^3$ PEL. Brief for Petitioner in No. 79–1583, pp. 15–16; Brief for Petitioners in No. 79–1429, p. 29.

[69] The final Standard, 29 CFR § 1910.1043 (f) (1) (1980), provides:

"Where the use of respirators is required under this section, the employer shall provide, at no cost to the employee, and assure the use of respirators

employer to give employees unable to wear a respirator[70] the opportunity to transfer to another position, if available, where the dust level meets the Standard's PEL. 29 CFR § 1910.1043 (f)(2)(v) (1980). When such a transfer occurs, the employer must guarantee that the employee suffers no loss of earnings or other employment rights or benefits.[71] Petitioners do not object to the transfer provision, but challenge OSHA's authority under the Act to require employers to guarantee employees' wage and employment benefits following the transfer. The Court of Appeals held that OSHA has such authority. 199 U. S. App. D. C., at 93, 617 F. 2d, at 675. We hold that, whether or not OSHA has this underlying authority, the agency has failed to make the necessary determination or statement of reasons that its wage guaran-

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which comply with the requirements of this paragraph (f). Respirators shall be used in the following circumstances:

"(i) During the time periods necessary to install or implement feasible engineering controls and work practice controls;

"(ii) During maintenance and repair activities in which engineering and work practice controls are not feasible;

"(iii) In work situations where feasible engineering and work practice controls are not yet sufficient to reduce exposure to or below the permissible exposure limit; and

"(iv) In operations specified under paragraph (g)(1);

"(v) Whenever an employee requests a respirator."

[70] An employee may be unable to wear a respirator because of facial irritation, severe discomfort, or impaired breathing. 43 Fed. Reg. 27387, cols. 1 and 2 (1978).

[71] The regulation, 29 CFR § 1019.1043 (f)(2)(v) (1980) (emphasis added), provides:

"Whenever a physician determines that an employee is unable to wear any form of respirator, including a power air purifying respirator, the employee shall be given the opportunity to transfer to another position which is available or which later becomes available having a dust level at or below the PEL. *The employer shall assure that an employee who is transferred due to an inability to wear a respirator suffers no loss of earnings or other employment rights or benefits as a result of the transfer.*"

tee requirement is related to the achievement of a safe and healthful work environment.

Respondents urge several statutory bases for the authority exercised here. They cite § 2 (b) of the Act, 29 U. S. C. § 651 (b), which declares that the purpose of the Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions"; § 2 (b)(5), which suggests achievement of the purpose "by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems"; § 6 (b)(5), which requires the agency to "set the standard which most adequately assures . . . that no employee will suffer material impairment of health or functional capacity . . ."; and § 3 (8), which provides that a standard must require "conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment." Brief for Federal Respondent 68. Whatever methods these provisions authorize OSHA to apply, it is clear that such methods must be justified on the basis of their relation to safety or health.

Section 6 (f) of the Act, 29 U. S. C. § 655 (f), requires that "*determinations* of the Secretary" must be supported by substantial evidence. Section 6 (e), 29 U. S. C. § 655 (e), requires the Secretary to include "a *statement of the reasons* for such action, which shall be published in the Federal Register." In his "Summary and Explanation of the Standard," the Secretary stated: "Each section includes an analysis of the record evidence and the policy considerations underlying the decisions adopted pertaining to specific provisions of the standard." 43 Fed. Reg. 27380, col. 2 (1978). But OSHA never explained the wage guarantee provision as an approach designed to contribute to increased health protection. Instead the agency stated that the "goal of this provision is to minimize any adverse economic impact on the employee by virtue of the inability to wear a respirator." *Id.*, at 27387,

col. 3. Perhaps in recognition of this fact, respondents in their briefs argue:

> "Experience under the Act has shown that employees are reluctant to disclose symptoms of disease and tend to minimize work-related health problems for fear of being discharged or transferred to a lower paying job. . . . It may reasonably be expected, therefore, that many employees incapable of using respirators would continue to breathe unhealthful air rather than request a transfer, thus destroying the utility of the respirator program." Brief for Federal Respondent 67.

See Brief for Union Respondents 51.[72]

Whether these arguments have merit, and they very well may,[73] the *post hoc* rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 419 (1971); *Burlington Truck Lines* v. *United States*, 371 U. S. 156, 168–169 (1962); *SEC* v.

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[72] Although it cited no specific determination or statement of reasons proffered by the Secretary, the Court of Appeals was persuaded by this argument. 199 U. S. App. D. C., at 93, 617 F. 2d, at 675.

[73] There is evidence in the record that might support such a determination. Dr. Merchant testified that a medical surveillance program alone would not be sufficient for identifying and relocating employees suffering from byssinosis. App. 440–441. He observed:

"There is reluctance very often among the employee himself to leave his job. I think clearly some guarantees as to wages and opportunities must be an integral part of any recommendation to relocate somebody and it has been the experience in coal mining where miners are allowed, under the Coal Mine Health and Safety Act of 1968, to be transferred, a very low proportion of these men actually exercise their transfer rights." *Id., at* 441.

However, the courts will not be expected to scrutinize the record to uncover and formulate a rationale explaining an action, when the agency in the first instance has failed to articulate such rationale. See *Automotive Parts & Accessories Assn.* v. *Boyd*, 132 U. S. App. D. C. 200, 208, 407 F. 2d 330, 338 (1968).

Chenery Corp., 318 U. S. 80, 87 (1943). For Congress gave OSHA the responsibility to protect worker health and safety, and to explain its reasons for its actions. Because the Act in no way authorizes OSHA to repair general unfairness to employees that is unrelated to achievement of health and safety goals, we conclude that OSHA acted beyond statutory authority when it issued the wage guarantee regulation.[74]

V

When Congress passed the Occupational Safety and Health Act in 1970, it chose to place pre-eminent value on assuring employees a safe and healthful working environment, limited only by the feasibility of achieving such an environment. We must measure the validity of the Secretary's actions against the requirements of that Act. For "[t]he judicial function does not extend to substantive revision of regulatory

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[74] In its specific discussion of the transfer/guarantee provision, occupying more than two-thirds of a page in the Federal Register, OSHA argued that "[i]t is manifestly unfair that employees who are unable to wear respirators suffer . . . economic detriment because their employers have not yet achieved compliance with the engineering control requirements of the standard, but are relying instead on the interim and less effective device of respirators." 43 Fed. Reg. 27387, cols. 2 and 3 (1978). The agency then stated its judgment that the "protection [the transfer and guarantee regulation] affords should greatly increase the success of the standard's respiratory protection provisions." *Id.*, at 27387, col. 3. Since the Secretary had already presented an unauthorized reason for the guarantee provision, we decline to accept this "boilerplate" statement as a sufficient determination and statement of reasons within the meaning of the Act. 29 U. S. C. §§ 655 (e), (f). See *Synthetic Organic Chemical Manufacturers Assn.* v. *Brennan*, 503 F. 2d 1155, 1157, 1160 (CA3 1974), cert. denied, 420 U. S. 973 (1975); *Industrial Union Dept.* v. *Hodgson*, 162 U. S. App. D. C., at 339–340, 499 F. 2d, at 475–476; *Associated Industries of New York State, Inc.* v. *U. S. Dept. of Labor*, 487 F. 2d 342, 354 (CA2 1973); *Dry Color Manufacturers' Assn.* v. *Department of Labor*, 486 F. 2d 98, 105–106 (CA3 1973). See also Berger & Riskin, Economic and Technological Feasibility in Regulating Toxic Substances Under the Occupational Safety and Health Act, 7 Ecology L. Q. 285, 298–299 (1978).

policy. That function lies elsewhere—in Congressional and Executive oversight or amendatory legislation." *Industrial Union Dept.* v. *American Petroleum Institute*, 448 U. S., at 663 (BURGER, C. J., concurring); see *TVA* v. *Hill*, 437 U. S. 153, 185, 187–188, 194–195 (1978).[75]

Accordingly, the judgment of the Court of Appeals is affirmed in all respects except to the extent of its approval of the Secretary's application of the wage guarantee provision of the Cotton Dust Standard at 29 CFR § 1910.1043 (f)(2)(v) (1980). To that extent, the judgment of the Court of Appeals is vacated and the case remanded with directions to remand to the Secretary for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL took no part in the decision of these cases.

JUSTICE STEWART, dissenting.

Section 6 (b)(5) of the Occupational Safety and Health Act provides:

> "The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." 29 U. S. C. § 655 (b)(5) (emphasis added).

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[75] Even had JUSTICE REHNQUIST correctly characterized the Court's opinion, *post*, at 544—and there were three possible constructions of the phrase "to the extent feasible"—this would hardly have been grounds for invalidating § 6 (b)(5) under the delegation doctrine. After all, this would not be the first time that more than one interpretation of a statute had been argued. See, *e. g.*, *Pennhurst State School* v. *Halderman*, 451 U. S. 1 (1981); *Watt* v. *Alaska*, 451 U. S. 259 (1981).

Everybody agrees that under this statutory provision the Cotton Dust Standard must at least be *economically* feasible, and everybody would also agree, I suppose, that in order to determine whether or not something is economically feasible, one must have a fairly clear idea of how much it is going to cost. Because I believe that OSHA failed to justify its estimate of the cost of the Cotton Dust Standard on the basis of substantial evidence, I would reverse the judgment before us without reaching the question whether the Act requires that a standard, beyond being economically feasible, must meet the demands of a cost-benefit examination.

The simple truth about OSHA's assessment of the cost of the Cotton Dust Standard is that the agency never relied on any study or report purporting to predict the cost to industry of the Standard finally adopted by the agency. OSHA did have before it one cost analysis, that of the Research Triangle Institute, which attempted to predict the cost of the final Standard. However, as recognized by the Court, *ante*, at 524–525, the agency flatly rejected that prediction as a gross overestimate. The only other estimate OSHA had, the Hocutt-Thomas estimate prepared by industry researchers, was not designed to predict the cost of the final OSHA Standard. Rather, it assumed a far less stringent and inevitably far less costly standard for all phases of cotton production except roving. *Ante*, at 527, n. 50. The agency examined the Hocutt-Thomas study, and concluded that it too was an overestimate of the costs of the less stringent standard it was addressing. I am willing to defer to OSHA's determination that the Hocutt-Thomas study was such an overestimate, conceding that such subtle financial and technical matters lie within the discretion and skill of the agency. But in a remarkable non sequitur, the agency decided that because the Hocutt-Thomas study was an overestimate of the cost of a less stringent standard, it could be treated as a reliable estimate for the more costly final Standard actually promulgated, never rationally explaining how it came to this happy

conclusion. This is not substantial evidence. It is unsupported speculation.

Of course, as the Court notes, this Court will re-examine a court of appeals' review of a question of substantial evidence "only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 491. But I think this is one of those rare instances where an agency has categorically misconceived the nature of the evidence necessary to support a regulation, and where the Court of Appeals has failed to correct the agency's error. Of course, broad generalizations about the meaning of "substantial evidence" have limited value in deciding particular cases. But within the confines of a single statute, where the agency and reviewing courts have identified certain specific factual matters to be proved, we can establish practical general criteria for comprehending "substantial evidence."

Unlike the Court, I think it clear to the point of being obvious that, as a matter of law, OSHA's prediction of the cost of the Cotton Dust Standard lacks a basis in substantial evidence, since the agency did not rely on even a single estimate of the cost of the actual Standard it promulgated. Accordingly, I respectfully dissent.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

A year ago I stated my belief that Congress in enacting § 6 (b)(5) of the Occupational Safety and Health Act of 1970 unconstitutionally delegated to the Executive Branch the authority to make the "hard policy choices" properly the task of the legislature. *Industrial Union Dept.* v. *American Petroleum Institute*, 448 U. S. 607, 671 (1980) (concurring in judgment). Because I continue to believe that the Act exceeds Congress' power to delegate legislative authority to nonelected officials, see *J. W. Hampton & Co.* v. *United*

States, 276 U. S. 394 (1928), and *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935), I dissent.

I will repeat only a little of what I said last Term. Section 6 (b)(5) provides in pertinent part:

> "The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." (Emphasis added.)

As the Court correctly observes, the phrase "to the extent feasible" contains the critical language for the purpose of these cases. We are presented with a remarkable range of interpretations of that language. Petitioners contend that the statute *requires* the Secretary to demonstrate that the benefits of its "Cotton Dust Standard," in terms of reducing health risks, bear a reasonable relationship to its costs. Brief for Petitioners in No. 79–1429, pp. 38–41. Respondents, including the Secretary of Labor at least until his postargument motion, counter that Congress itself balanced costs and benefits when it enacted the statute, and that the statute *prohibits* the Secretary from engaging in a cost-benefit type balancing. Their view is that the Act merely requires the Secretary to promulgate standards that eliminate or reduce such risks "to the extent . . . technologically or economically feasible." Brief for Federal Respondent 38; Brief for Union Respondents 26–27. As I read the Court's opinion, it takes a different position. It concludes that, at least as to the "Cotton Dust Standard," the Act does not require the Secretary to engage in a cost-benefit analysis, which suggests of course that the Act *permits* the Secretary to undertake such an analysis if he so chooses. *Ante*, at 510–512.

Throughout its opinion, the Court refers to § 6 (b)(5) as adopting a "feasibility standard" or a "feasibility requirement." *Ante,* at 508–522. But as I attempted to point out last Term in *Industrial Union Dept.* v. *American Petroleum Institute, supra,* at 681–685, the "feasibility standard" is no standard at all. Quite the contrary, I argued there that the insertion into § 6 (b)(5) of the words "to the extent feasible" rendered what had been a clear, if somewhat unrealistic, statute into one so vague and precatory as to be an unconstitutional delegation of legislative authority to the Executive Branch. Prior to the inclusion of the "feasibility" language, § 6 (b)(5) simply required the Secretary to "set the standard which most adequately assures, on the basis of the best available professional evidence, that no employee will suffer any impairment of health . . . ." Legislative History, Occupational Safety and Health Act of 1970, p. 943 (Comm. Print 1971) (hereinafter Leg. Hist.). Had that statute been enacted, it would undoubtedly support the result the Court reaches in these cases, and it would not have created an excessive delegation problem. The Secretary of Labor would quite clearly have been authorized to set exposure standards without regard to any kind of cost-benefit analysis.

But Congress did not enact that statute. The legislative history of the Act reveals that a number of Members of Congress, such as Senators Javits, Saxbe, and Dominick, had difficulty with the proposed statute and engaged Congress in a lengthy debate about the extent to which the Secretary should be authorized to create a risk-free work environment. Congress had at least three choices. It could have required the Secretary to engage in a cost-benefit analysis prior to the setting of exposure levels, it could have prohibited cost-benefit analysis, or it could have permitted the use of such an analysis. Rather than make that choice and resolve that difficult policy issue, however, Congress passed. Congress simply said that the Secretary should set standards "to the extent feasible." Last year, JUSTICE POWELL reflected that

"one might wish that Congress had spoken with greater clarity." *American Petroleum Institute*, 448 U. S., at 668 (POWELL, J., concurring in part and in judgment). I am convinced that the reason that Congress did not speak with greater "clarity" was because it could not. The words "to the extent feasible" were used to mask a fundamental policy disagreement in Congress. I have no doubt that if Congress had been required to choose whether to mandate, permit, or prohibit the Secretary from engaging in a cost-benefit analysis, there would have been no bill for the President to sign.

The Court seems to argue that Congress *did* make a policy choice when it enacted the "feasibility" language. Its view is that Congress required the Secretary to engage in something called "feasibility analysis." *Ante*, at 509. But those words mean nothing at all. They are a "legislative mirage, appearing to some Members [of Congress] but not to others, and assuming any form desired by the beholder." *American Petroleum Institute, supra*, at 681. Even the Court does not settle on a meaning. It first suggests that the language requires the Secretary to do what is "capable of being done." *Ante*, at 508–509. But, if that is all the language means, it is merely precatory and "no more than an admonition to the Secretary to do his duty . . . ." Leg. Hist. 367 (remarks of Sen. Dominick). The Court then seems to adopt the Secretary's view that feasibility means "technological and economic feasibility." But there is nothing in the words of § 6 (b)(5), or their legislative history, to suggest why they should be so limited. One wonders why the "requirement" of § 6 (b)(5) could not include considerations of administrative or even political feasibility. As even the Court recognizes, when Congress has wanted to limit the concept of feasibility to technological and economic feasibility, it has said so. *Ante*, at 510. Thus the words "to the extent feasible" provide no meaningful guidance to those who will administer the law.

In believing that § 6 (b)(5) amounts to an unconstitutional delegation of legislative authority to the Executive Branch, I do not mean to suggest that Congress, in enacting a statute, must resolve all ambiguities or must "fill in all of the blanks." Even the neophyte student of government realizes that legislation is the art of compromise, and that an important, controversial bill is seldom enacted by Congress in the form in which it is first introduced. It is not unusual for the various factions supporting or opposing a proposal to accept some departure from the language they would prefer and to adopt substitute language agreeable to all. But that sort of compromise is a far cry from this case, where Congress simply abdicated its responsibility for the making of a fundamental and most difficult policy choice—whether and to what extent "the statistical possibility of future deaths should . . . be disregarded in light of the economic costs of preventing those deaths." *American Petroleum Institute, supra,* at 672. That is a "quintessential legislative" choice and must be made by the elected representatives of the people, not by nonelected officials in the Executive Branch. As stated last Term:

> "In drafting § 6 (b)(5), Congress was faced with a clear, if difficult, choice between balancing statistical lives and industrial resources or authorizing the Secretary to elevate human life above all concerns save massive dislocation in an affected industry. That Congress recognized the difficulty of this choice is clear . . . . That Congress chose, intentionally or unintentionally, to pass this difficult choice on to the Secretary is evident from the spectral quality of the standard it selected." 448 U. S., at 685.

In sum, the Court is quite correct in asserting that the phrase "to the extent feasible" is the critical language for the purposes of these cases. But that language is critical, not because it establishes a general standard by which those charged

with administering the statute may be guided, but because it has precisely the opposite effect: in failing to agree on whether the Secretary should be either mandated, permitted, or prohibited from undertaking a cost-benefit analysis, Congress simply left the crucial policy choices in the hands of the Secretary of Labor.* As I stated at greater length last Term, I believe that in so doing Congress unconstitutionally delegated its legislative responsibility to the Executive Branch.

*Contrary to the suggestion of the Court, *ante*, at 541, n. 75, I do *not* argue that the existence of several plausible interpretations of the statute is a ground for invoking the delegation doctrine: I invoke the delegation doctrine because Congress failed to *choose* among those plausible interpretations.

MONROE *v.* STANDARD OIL CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 80-298. Argued March 4, 1981—Decided June 17, 1981

The Vietnam Era Veterans' Readjustment Assistance Act of 1974 provides in 38 U. S. C. § 2021 (b)(3) that any employee of a private employer "shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Forces." Petitioner was an employee in respondent's refinery, which operated 24 hours a day, every day of the year, and whose employees worked five 8-hour days weekly but in a different 5-day sequence each week. As a military reservist, petitioner had to attend training with his unit one weekend a month and for two weeks each summer. On a number of weekends, petitioner was required to attend training on days when he was scheduled to work at the refinery, and in most instances he was unable to exchange shifts with other employees as he was permitted to do. Respondent provided him with leaves of absence to attend training, as required by 38 U. S. C. § 2024 (d), but it did not pay him for the hours he did not work nor did it take steps to permit him to make up those hours by working outside the normal schedule. Petitioner brought an action against respondent in Federal District Court, alleging, *inter alia*, that respondent had violated § 2021 (b)(3). The District Court granted summary judgment for petitioner on the ground that respondent, by not scheduling petitioner for a full 40-hour week on those occasions when he was unable to exchange shifts, had denied him "an incident or advantage of employment" within the meaning of § 2021 (b)(3), and awarded him an amount for wages lost on those "work dates when an accommodation should have been made." The Court of Appeals reversed, holding that respondent had taken no discriminatory action proscribed by § 2021 (b)(3).

Held: Section 2021 (b)(3) does not require an employer to make work-scheduling accommodations for employee-reservists not made for other employees. Pp. 554–566.

(a) The legislative history indicates that § 2021 (b)(3) was enacted for the significant but limited purpose of protecting the employee-reservist from discrimination like discharge and demotion motivated

solely by reserve status. There is nothing in § 2021 (b)(3) or its legislative history to indicate that Congress even considered imposing an obligation on employers to provide a special work-scheduling preference, but rather the history suggests that Congress did not intend employers to provide special benefits to employee-reservists not generally made available to other employees. Pp. 554–562.

(b) While this case involves absences for weekend duty, § 2021 (b)(3) refers to "any obligation as a member of a Reserve component." Accordingly, there is no principled way of distinguishing between an employer's obligation to make scheduling accommodations for weekends as opposed to, for example, annual 2-week training periods, or even longer periods of training or duty. There is nothing in the legislative history to indicate that Congress intended reservists to be entitled to all "incidents and advantages of employment" accorded during their absence to working employees, including regular time and overtime pay. Pp. 562–563.

(c) There is nothing in the statute or its history to support petitioner's contention that § 2021 (b)(3) only requires an employer under the circumstances of this case to make a "reasonable accommodation" to employee-reservists. Such a "reasonable accommodation" has already been made in § 2024 (d) by requiring employers to grant a leave of absence to reservists whose duties force them to miss time at work. To say that § 2021 (b)(3) would be of little significance unless a "reasonable accommodation" requirement is imposed, ignores the fact that the nondiscrimination requirements of the section already impose substantial obligations on employers by precluding them from ridding themselves of the inconveniences and productivity losses resulting from employee-reservists' absence by discharging or otherwise disadvantaging such employees solely because of their military obligations. Pp. 563–565.

613 F. 2d 641, affirmed.

STEWART, J., delivered the opinion of the Court, in which WHITE, MARSHALL, REHNQUIST, and STEVENS, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and POWELL, JJ., joined, *post*, p. 566.

Alan I. Horowitz argued the cause for petitioner. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Daniel, Robert E. Kopp, Beate Bloch, Lois G. Williams, Kerry L. Adams,* and *William Taylor.*

Paul S. McAuliffe argued the cause and filed a brief for respondent.*

JUSTICE STEWART delivered the opinion of the Court.

The Court of Appeals for the Sixth Circuit concluded that 38 U. S. C. § 2021 (b)(3), a provision of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, does not require an employer to provide preferential scheduling of work hours for an employee who must be absent from work to fulfill his military reserve obligations. 613 F. 2d 641. We granted certiorari to consider the petitioner's contention that an employer has a statutory duty to make work-scheduling accommodations for reservist-employees not made for other employees, whenever such accommodations reasonably can be accomplished. 449 U. S. 949.[1]

I

In 1975 and 1976, the years pertinent to this litigation, the petitioner was a full-time employee in the respondent's continuous process refinery in Lima, Ohio. The refinery was operated 24 hours a day, 7 days a week, 365 days a year. To insure that the burdens of weekend and shift work would be equitably divided among its employees over the course of a year, the respondent scheduled its employees to work five 8-hour days in a row weekly, but in a different 5-day sequence each week. Under the respondent's collective agreement with its union, however, an employee could, with the acquiescence of his foreman and if the change did not require the payment of overtime, exchange shifts with another employee.

During the same period, the petitioner was a military re-

Martin J. Klaper and *David L. Gray* filed a brief for Cummins Engine Co., Inc., as *amicus curiae* urging affirmance.

[1] There is an apparent intercircuit conflict on this issue. Compare the case under review with *West* v. *Safeway Stores, Inc.*, 609 F. 2d 147 (CA5).

servist,[2] and had to attend training with his unit one weekend a month and for two weeks each summer. On a number of weekends, the petitioner was required to attend training on days when he was scheduled to work at the refinery. Although the petitioner was able on four of these occasions to exchange shifts with other employees, he was unable to make such an exchange in most instances. The respondent provided him with leaves of absence to attend training, as 38 U. S. C. § 2024 (d) [3] required it to do, but it did not pay him for the hours he did not work, nor did it take steps to permit him to make up those hours by working outside his normal schedule. When the petitioner was on a leave of absence and could not arrange a switch with another employee, the respondent would make arrangements to fill the vacancy created by the petitioner's absence, arrangements often requiring the payment of overtime wages to the substitute.

In 1976, the petitioner [4] brought this action against the respondent alleging that it had violated the provisions of 38 U. S. C. §§ 2021 (b)(3) [5] and 2024 (d). Noting that the

[2] In oral argument, counsel for the respondent indicated that the petitioner was a member of the Ohio National Guard. This is not apparent in the record, but both Ready Reservists and National Guardsmen are equally entitled to the protection of 38 U. S. C. § 2021 (b)(3). See S. Rep. No. 1477, 90th Cong., 2d Sess., 1, 5 (1968); H. R. Rep. No. 1303, 90th Cong., 2d Sess., 3, 6 (1968).

[3] Title 38 U. S. C. § 2024 (d) provides in pertinent part:

"Any employee . . . shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty for training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty for training, . . . such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes. . . ."

[4] The Department of Justice represents the petitioner pursuant to 38 U. S. C. § 2022.

[5] Section 2021 (b)(3) provides:

"Any person who holds a position described in clause (A) or (B) of sub-

first of these sections provides that an employer may not deny a military reservist in his employ any "incident or advantage of employment" because of the employee's obligations to the Reserves, and finding that "being scheduled for a full forty hour week at the [respondent's] refinery constitutes an incident or advantage of employment," the District Court for the Northern District of Ohio granted summary judgment to the petitioner. 446 F. Supp. 616, 618, 619. The court awarded petitioner $1,086.72 for wages lost on those "work dates when an accommodation should have been made." *Id.*, at 619.[6]

The Court of Appeals for the Sixth Circuit reversed. 613 F. 2d 641. First, it determined that the respondent had met the requirements of § 2024 (d).[7] It noted that this section "guarantees terms and conditions of reemployment to reservists returning from inactive duty training," but found that "[i]t does not, however, protect reservists from discrimination by their employers between training assignments." *Id.*, at 643–644.

Next, the Court of Appeals rejected the District Court's

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section (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces."

[6] The petitioner does not urge here that he had to be paid for hours not worked.

[7] There is no dispute that the respondent has complied with all relevant requirements of § 2024 (d). See n. 3, *supra*. This section compels employers to grant leaves of absence to employees who must attend reserve training, and entitles a reservist who has been absent for inactive reserve training to benefits upon his return, such as wage rates and seniority, which automatically would have accrued if he had remained in the continuous service of his employer. See *Aiello* v. *Detroit Free Press, Inc.*, 570 F. 2d 145, 148 (CA6). It does not entitle a reservist to benefits that are conditioned upon work requirements demanding actual performance on the job. See *ibid.* See also *Foster* v. *Dravo Corp.*, 420 U. S. 92. Thus, it is not contended that § 2024 (d) requires employers to pay absent reservists for hours not worked.

interpretation of § 2021 (b)(3). It held that this section "merely requires that reservists be treated equally or neutrally with their fellow employees without military obligations." *Id.*, at 646. The appellate court then concluded that the respondent had taken no discriminatory action that is proscribed by § 2021 (b)(3):

> "The requirement of equal treatment was met in the present case. The parties agreed that appellee was regularly scheduled for forty-hour workweeks, as were his fellow employees. Further, Monroe was scheduled for weekend work in accordance with Sohio's established practice of rotating shifts to insure that all employees would work approximately an equal number of weekend days. Finally, he was treated the same as his coworkers with regard to the right to exchange shifts with other employees." *Id.*, at 646.

II

This case presents the first occasion this Court has had to address issues arising from the statutory provisions, codified at 38 U. S. C. § 2021 *et seq.*, specifically dealing with military reservists.[8] We have, however, frequently interpreted the somewhat analogous statutory provisions entitling the returning regular veteran to reinstatement with his "seniority, status and pay" intact, 38 U. S. C. § 2021 (a), most recently in *Coffy* v. *Republic Steel Corp.*, 447 U. S. 191, and *Alabama Power Co.* v. *Davis*, 431 U. S. 581.

A

Statutory re-employment rights for veterans date from the Nation's first peacetime draft law, passed in 1940, which provided that a veteran returning to civilian employment

[8] Before their recodification in 1974, the veterans' re-employment rights provisions were codified at 50 U. S. C. App. § 459 (1970 ed.) (§ 9 of the Military Selective Service Act of 1967). See *Coffy* v. *Republic Steel Corp.*, 447 U. S. 191, 194, n. 2.

from active duty was entitled to reinstatement to the position that he had left or one of "like seniority, status, and pay." 38 U. S. C. § 2021 (a). In 1951, in order to strengthen the Nation's Reserve Forces, Congress extended reinstatement rights to employees returning from training duty. See Pub. L. 51, ch. 144, § 1 (s), 65 Stat. 75, 86–87. Thereafter, the Reserve Forces Act of 1955, Pub. L. 305, ch. 665, § 262 (f), 69 Stat. 598, 602, provided that employees returning from active duty of more than three months in the Ready Reserve were entitled to the same employment rights as inductees, with limited exceptions. In 1960, these re-employment rights were extended to National Guardsmen, Pub. L. 86–632, 74 Stat. 467. See 38 U. S. C. § 2024 (c). In addition, a new section, now codified at 38 U. S. C. § 2024 (d), was enacted in 1960 to deal with problems faced by employees who had military training obligations lasting less than three months. This section provides that employees must be granted a leave of absence for training and, upon their return, be restored to their position "with such seniority, status, pay, and vacation" as they would have had if they had not been absent for training.

Section 2024 (d) closely paralleled 38 U. S. C. § 2021 (a), the latter section ensuring the reinstatement of regular veterans returning from active duty.[9] But § 2024 (d) did not

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[9] Section 2021 (a) provides as follows:

"In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act [50 U. S. C. App. §§ 451–473] (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service; and (1) receives a certificate described in section 9 (a) of the Military Selective Service Act [50 U. S. C. App. § 459 (a)] (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

"(A) if such position was in the employ of the United States Gov-

provide reservists with protection against discharges, demotions, or other discriminatory conduct once reinstated. Section 2021 (b)(2), on the other hand, provided regular veterans returning from active duty one year's "protection . . . against certain types of discharges or demotions that might rob the veteran's reemployment of its substance." *Oakley* v. *Louisville & Nashville R. Co.*, 338 U. S. 278, 285. The legislative history of § 2021 (b)(3) indicates that it was designed to provide similar protection to employee-reservists.[10]

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ernment, its territories, or possessions, or political subdivisions thereof, or the District of Columbia, such person shall—

"(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

"(ii) if not qualified to perform the duties of such position, by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of the employer, be offered employment and, if such person so requests, be employed in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case;

"(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such employee shall—

"(i) if still qualified to perform the duties of such position, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay; or

"(ii) [as in (A)(ii), *supra*, except for references to the 'employer's successor in interest']."

[10] The bill that included what became 38 U. S. C. § 2021 (b)(3) was introduced in the 89th Congress. H. R. 11509, 89th Cong., 1st Sess. (1965). Hearings were held before Subcommittee No. 3 of the House Committee on Armed Services in February 1966. Hearings on H. R. 11509 before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Sess. (1966) (hereafter 1966 House Hearings). The bill was favorably reported by the full Committee, H. R. Rep. No. 1303, 89th Cong., 2d Sess. (1966), and was passed by the House on March 7, 1966, 112 Cong. Rec. 5016 (1966). No action, however, was taken on the measure by the Senate in the 89th Congress.

The bill was reintroduced in the 90th Congress. H. R. 1093, 90th Cong., 1st Sess. (1967); S. 2561, 90th Cong., 1st Sess. (1967). Hearings

B

Section 2021 (b)(3) provides in pertinent part:

> "Any person who [is employed by a private employer] shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces."

The Senate Report on the bill that became § 2021 (b)(3), stated that the purpose of the enactment was "to prevent reservists and National Guardsmen not on active duty who must attend weekend drills or summer training from being discriminated against in employment because of their Reserve membership . . . ." S. Rep. No. 1477, 90th Cong., 2d Sess., 1–2 (1968). The Report explained that "[e]mployment practices that discriminate against employees with Reserve obligations have become an increasing problem in recent years. Some of these employees have been denied promotions because they must attend weekly drills or summer training

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were again held before Subcommittee No. 3 of the House Committee, on March 20, 1968. Hearings on H. R. 1093 before Subcommittee No. 3 of the House Committee on Armed Services, 90th Cong., 1st Sess. (1968) (hereafter 1968 House Hearings). The bill was favorably reported by the full Committee on April 24, 1968, H. R. Rep. No. 1303, 90th Cong., 2d Sess. (1968), and initially passed by the House on May 6, 1968, 114 Cong. Rec. 11779 (1968). Hearings were held by the Senate Committee on Armed Services on July 25, 1968. Hearings on H. R. 1093 before Senate Committee on Armed Services, 90th Cong., 2d Sess. (1968) (hereafter 1968 Senate Hearings). The bill was favorably reported by the Committee, S. Rep. No. 1477, 90th Cong., 2d Sess. (1968), on July 26, 1968, and passed the Senate on July 29, 1968, 114 Cong. Rec. 24017 (1968). The Senate concurred in the House amendment. *Id.*, at 24999. The bill was signed into law on August 17, 1968. Pub. L. 90–491, 82 Stat. 790.

The language of that portion of the bill which became § 2021 (b)(3) was unchanged throughout its legislative consideration. There was no substantive discussion of the measure on the floor of either chamber. Accordingly, the key portions of the legislative history are the three hearings held on the proposed measure and the three Committee Reports.

and others have been discharged because of these obligations. . . . [T]he bill is intended to protect members of the Reserve components of the Armed Forces from such practices." *Id.*, at 2. The protection was to be accomplished by entitling reservists "to the same treatment afforded their coworkers not having such military obligations . . . ." *Ibid.*

The House Report announced the same motivation. The bill was described as providing "job protection for employees with obligations as members of a reserve component." H. R. Rep. No. 1303, 90th Cong., 2d Sess., 3 (1968). The House Report elaborated as follows:

> "Section (1) amplifies existing law to make clear that reservists not on active duty, who have a remaining Reserve obligation, whether acquired voluntarily or involuntarily, will nonetheless not be discriminated against by their employees [*sic*] soley [*sic*] because of such Reserve affiliation.
>
> *"It assures that these reservists will be entitled to the same treatment afforded their coworkers without such military obligation.*
>
> *"The law does not now protect these reservists against discharge without cause, as it does with inductees and enlistees, who have 1-year protection, and initial active duty for training reservists, who have 6 months' protection."* *Ibid.* (emphasis added).

The legislation was originally proposed by the Department of Labor. Accordingly, the testimony of Hugh W. Bradley, Director of the Office of Veterans' Reemployment Rights of the Labor Department, who was the chief administration spokesman for the provision, is instructive. He described the relevant portions of the legislation to the House Committee on Armed Services:

> "The first provision of the bill deals with a problem that has been increasingly difficult in the past few years. *It is designed to enable reservists and guardsmen who leave*

> *their jobs to perform training in the Armed Forces, to retain their employment and to enjoy all of the employment opportunities and benefits accorded their coworkers who do not have military training obligations. The law does not now protect them against discharge without cause as it does inductees and enlistees, who have 1-year protection, and initial active duty for training reservists, who have 6 months' protection.*" 1966 House Hearings, at 5312 (emphasis added).

See also 1968 House Hearings, at 7471.

Testimony by Rear Admiral Burton H. Shupper, U. S. N., appearing on behalf of the Department of Defense, also reflected the purposes behind the enactment:

> "The other aspect of H. R. 11509 is the provision that employees shall not be denied retention in employment or advantages of employment because of any obligation as a member of a Reserve component of the Armed Forces. *After the Berlin and Cuba callups, we received information from our Reserve community that a significant number of reservists were receiving indications that opportunities for advancement and retention in civilian employment would favor those who appear to offer their employers more continuity of services, namely those in the Standby Reserve or those with no Reserve* status. In fairness, we must emphasize that this reaction on the part of employers appears to be the exception not the rule and, we believe, is generally not based upon unpatriotic motives but rather on the competitive spirit of business." 1966 House Hearings, at 5315.

The legislative history thus indicates that § 2021 (b)(3) was enacted for the significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotion, motivated solely by reserve status. Congress wished to provide protection to reservists compara-

ble to that already protecting the regular veteran from "discharge without cause"—to insure that employers would not penalize or rid themselves of returning reservists after a mere *pro forma* compliance with § 2024 (d).[11] And the consistent focus of the administration that proposed the statute, and of the Congresses that considered it, was on the need to protect reservists from the temptation of employers to deny them the same treatment afforded their co-workers without military obligations. The petitioner's contention that his employer was obliged to provide work-schedule preferences not available to other employees must be considered against this legislative background.

C

The petitioner's argument is that the respondent corporation was obligated to make special efforts to schedule his work hours so he would avoid any lost time by reason of his reserve obligations. He does not allege that the respondent singled him out unfairly, or in any other way discriminated

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[11] This same purpose was reflected in a statement in support of the legislation by Austin E. Kerby, the Director of the National Economic Commission of the American Legion:

"The American Legion feels very strongly that employees with reserve obligations who are members of the National Guard and the Reserves *should not be denied retention in employment or promotional opportunities solely because of their participation in the Reserve Training Program.* They should be afforded all the employment opportunities and benefits as those who do not have training obligations. The Reemployment Rights Statutes do not now protect National Guard members and Reservists as it does inductees and enlistees, who have one-year protection, and initial active duty for training reservists who have six-months protection.

"H. R. 1093 [H. R. 11509 as reintroduced in the 90th Congress, see n. 10, *supra*] would add a new section, 9 (c)(3), under the reemployment provisions of the Universal Military Training and Service Act which would prevent discharge from employment without cause because of membership in the National Guard or Reserves, and would also prevent discrimination in such areas as promotion, training opportunities and pay increases." 1968 Hearings, at 7477 (emphasis added).

against him vis-à-vis other employees in the scheduling of work. Indeed, the petitioner's argument would require work-assignment preferences not available to any nonreservist employee at the respondent's refinery.

The problem with the petitioner's position is that there is nothing in § 2021 (b)(3) or its legislative history to indicate that Congress ever even considered imposing an obligation on employers to provide a special work-scheduling preference. Indeed, the legislative history, set out above, strongly suggests that Congress did not intend employers to provide special benefits to employee-reservists not generally made available to other employees.[12] Congress, and the administration spokesman for the legislation, stated explicitly that reservists were to be entitled "to the same treatment afforded their coworkers not having such military obligations . . . ." S. Rep. No. 1477, 90th Cong., 2d Sess., 2 (1968); see also H. R. Rep. No. 1303, 89th Cong., 2d Sess., 3 (1966); 1968 House Hearings, at 7471 (testimony of Hugh W. Bradley).

The strongest language culled by the petitioner from the legislative history to support his argument is a single passage in the 1966 House Report on H. R. 11509: "If these young men are essential to our national defense, then certainly our Government and employers have a moral obligation to see that their economic well being is disrupted to the minimum extent possible." H. R. Rep. No. 1303, 89th Cong., 2d Sess., 3 (1966).[13] But this generalized statement appears

[12] One could argue, of course, that "protection . . . against certain types of discharges or demotions that might rob the veteran's reemployment of its substance," *Oakley* v. *Louisville & Nashville R. Co.*, 338 U. S. 278, 285 (in reference to § 2021 (b)(2) but equally relevant here) amounts to preferential treatment. But this sort of treatment, clearly intended by the statute and its legislative history, is better understood as protection against discrimination that would not have occurred were it not for reserve obligations, than as preferential treatment accorded solely because of reserve status.

[13] The legislative history is barren of any indication that Congress intended employers to compensate employees for work hours missed while

only in the 1966 House Report; it is not contained in either the House or the Senate Report that accompanied the bill as finally enacted in the 90th Congress. Compare *ibid.* with H. R. Rep. No. 1303, 90th Cong., 2d Sess., 3, 8 (1968), and S. Rep. No. 1477, 90th Cong., 2d Sess., 3 (1968). Moreover, language in the same 1966 House Report specifically indicated that only a nondiscrimination measure was intended: "It should be noted that the only substantive changes in existing law relate to . . . the prohibition against employer discrimination against reservists who participate in the Reserve or National Guard programs." H. R. Rep. No. 1303, 89th Cong., 2d Sess., 4 (1966).

It appears that the origin of the passage the petitioner relies on is a statement by Hugh W. Bradley before the House Committee in 1966. See 1966 House Hearings, at 5313. Yet this passage disappeared from Bradley's presentation to both the House and Senate Committees in the subsequent Congress. See 1968 House Hearings, at 7471, 7472; 1968 Senate Hearings, at 2, 3. And in all three of his congressional appearances, Bradley made it abundantly clear that the purpose of the legislation was to protect employee reservists from discharge, denial of promotional opportunities, or other comparable *adverse* treatment solely by reason of their military obligations; there was never any suggestion of employer responsibility to provide preferential treatment. In any case, the language relied on by the petitioner hardly supports a finding that Congress intended § 2021 (b)(3) to convert a generalized moral obligation into a specific legal duty.

D

Aside from a lack of support in legislative history, the petitioner's argument suffers other flaws. While the present case

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fulfilling military reserve obligations, which would of course amount to employee receipt of double compensation for such periods.

involves absences for weekend duty, the statutory language is not so limited; it refers to "any obligation as a member of a Reserve component . . . ." Section 2021 (b)(3) has been applied, for example, to 2-week summer camps, *Carney* v. *Cummins Engine Co.*, 602 F. 2d 763 (CA7); 6-week training sessions, *Carlson* v. *New Hampshire Dept. of Safety*, 609 F. 2d 1025 (CA1); and 2-month training sessions, *Peel* v. *Florida Dept. of Transportation*, 443 F. Supp. 451 (ND Fla.), aff'd, 600 F. 2d 1070 (CA5). Accordingly, there is no principled way of distinguishing between an employer's obligation to make scheduling accommodations for weekends as opposed to, for example, annual 2-week training periods, or even longer periods of training or duty. And certainly there is nothing in the legislative history that would indicate Congress intended that reservists were to be entitled to all "incidents and advantages of employment" accorded during their absence to working employees, including regular time and overtime pay.[14]

The petitioner concedes that it might be impossible, or at least unduly burdensome, to accommodate a reservist's absences for periods as long as the mandatory 2-week summer training session. Perhaps for this reason, he attempts to limit the obvious implications of his theory by arguing that

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[14] The Veterans' Reemployment Rights Handbook, published by the Office of Veterans' Reemployment Rights in 1970 and still in use today, notes that "[t]he law does not require the employer to pay the employee for the time he is absent for military training duty, or even to make up the difference between his military pay and his regular earnings for that period. In this respect, of course, many employers have adopted voluntary policies or contractual obligations, or are subject to State statutes, which give reservists and guardsmen more than the statute [38 U. S. C. § 2021 *et seq.*] requires." *Id.*, at 113. And in the many examples in the Handbook addressed to typical problems an employer may confront because of employee military obligations, there is not so much as a hint that an employer has an obligation to adjust an employee's work schedule to make up for time lost because of military obligations.

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"the statute only requires an employer to take reasonable steps to accommodate the reservists." But, as is true of the petitioner's more general affirmative obligation theory, there is nothing in the statute or its history to support such a notion.

Indeed, a "reasonable accommodation" to employee-reservists because of missed worktime has already been made by Congress in § 2024 (d). There, Congress decided what allowance employers should make to reservists whose duties force them to miss time at work: provide them a leave of absence. If Congress had wanted to impose an additional obligation upon employers, guaranteeing that employee-reservists have the opportunity to work the same number of hours, or earn the same amount of pay that they would have earned without absences attributable to military reserve duties, it could have done so expressly.[15] By contrast, there is no evidence that the Congress that enacted § 2021 (b)(3) showed any concern with the problem of missed work hours, let alone imposed any duty to "take reasonable steps to accommodate the reservists" in this or any other respect.

The petitioner makes no suggestion why his theory of "reasonable accommodation" should apply only to "incidents or advantages of employment," and not to the other provisions of § 2021 (b)(3): retention and promotion. Presumably, if it applies to one provision of the section, it should apply to them all. But if an employer could, for example, defend a

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[15] Section 403 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. 93-508, 88 Stat. 1594, for example, made specific revisions to the existing provisions of the veterans' re-employment rights laws that impose explicit obligations upon employers with respect to certain disabled veterans of the Vietnam era. 38 U. S. C. § 2012. See S. Conf. Rep. No. 93-1107, p. 34 (1974). See also S. Conf. Rep. No. 93-1240, p. 34 (1974); H. R. Conf. Rep. No. 93-1303, p. 34 (1974); H. R. Conf. Rep. No. 93-1435, p. 35 (1974). Cf. *Southeastern Community College* v. *Davis*, 442 U. S. 397, 410-411.

denial of promotion to an employee-reservist because the promotion could not be "reasonably accommodated," the protection afforded by § 2021 (b)(3) would clearly be reduced, if not altogether eliminated.

Finally, the petitioner suggests that § 2021 (b)(3) must have the meaning he attributes to it, because the section would otherwise be of little significance. But the nondiscrimination requirements of the section impose substantial obligations upon employers. The frequent absences from work of an employee-reservist may affect productivity and cause considerable inconvenience to an employer who must find alternative means to get necessary work done. Yet Congress has provided in § 2021 (b)(3) that employers may not rid themselves of such inconveniences and productivity losses by discharging or otherwise disadvantaging employee-reservists solely because of their military obligations.

III

This Court does not sit to draw the most appropriate balance between benefits to employee-reservists and costs to employers. That is the responsibility of Congress. If Congress desires to amend § 2021 (b)(3) to require special work-hour scheduling for military reservists where it is reasonably possible, it is free to do so. But we must deal with the law as it is.

The respondent did not deny the petitioner anything that he would have received had he not been a reservist. He was scheduled for 40 hours work a week, as all other employees in the refinery were.[16] He was assigned the same burden of weekend and shift work as were his fellow employees. And he was allowed to exchange shifts in the man-

[16] We note that the collective agreement between the respondent and the petitioner's union stated that it "defines the normal hours of work and shall not be construed as a guarantee of hours of work per day or per week or of days of work per week."

ner accepted by his union and the respondent, just as all other employees were.[17] Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

CHIEF JUSTICE BURGER, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE POWELL join, dissenting.

The Court today unduly restricts the employment protections accorded Ready Reservists and National Guardsmen by Congress. In my view, the Court's decision is based upon an erroneous interpretation of 38 U. S. C. § 2021 (b)(3) and, in effect, allows employees to be penalized for their service in the military contrary to congressional intent.

I

A

As in any case involving statutory construction, "our starting point must be the language employed by Congress." *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 337 (1979). Title 38 U. S. C. § 2021 (a) requires that a veteran returning to civilian employment after military duty be restored to the position he previously held or to "a position of like seniority, status, and pay." In addition, 38 U. S. C. § 2021 (b)(1) provides that the veteran's reinstatement must be "without loss of seniority" and that he "shall not be discharged from such position without cause within one year after such restoration or reemployment." See *Oakley* v. *Louisville & Nashville R. Co.*, 338 U. S. 278, 284–285 (1949). Similar safeguards are granted in 38 U. S. C. § 2024 (c) to members of "a Reserve component of the Armed Forces" who have military obligations lasting more than three months. As to reservists whose

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[17] Of course, nothing in this opinion *prevents* an employer from providing special scheduling accommodation to employee-reservists. See n. 14, *supra*.

commitments are less than three months, 38 U. S. C. § 2024 (d) provides in pertinent part:

> "Any employee . . . shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes."

Additional guarantees for reservists are contained in 38 U. S. C. § 2021 (b)(3), on which petitioner bases his claim for nonconflicting work hours. Section 2021 (b)(3) states:

> "Any person who [is employed by the Federal Government, a state government, or a private employer] *shall not be denied retention in employment or any promotion or other incident or advantage of employment* because of any obligation as a member of a Reserve component of the Armed Forces." (Emphasis added.)

The Court concludes that "§ 2021 (b)(3) was enacted for the . . . limited purpose of protecting the employee-reservist against discriminations like discharge and demotion, motivated solely by reserve status." *Ante*, at 559. Yet the plain language of the statute belies such a narrow interpretation. Although § 2021 (b)(3) proscribes the termination of a reservist because of his military obligations, it also expressly prohibits the denial of "any promotion or other incident or advantage of employment." Such protection is clearly broader than that enjoyed by returning veterans under § 2021 (b)(1), but is understandable because the reservist has continuing

military commitments requiring his absence that may disadvantage him in his employment.

B

Just as the language of § 2021 (b)(3) does not demonstrate a congressional intent to confine the statute's application to "discriminations like discharge and demotion," neither does the legislative history. When the bill, H. R. 11509, 89th Cong., 1st Sess. (1965), that included what eventually became 38 U. S. C. § 2021 (b)(3) was first introduced, Subcommittee No. 3 of the House Committee on Armed Services held hearings and the full Committee thereafter reported favorably on the bill. The Committee's Report, which reflected the hearing testimony of Hugh W. Bradley, Director of the Office of Veterans' Reemployment Rights of the Department of Labor, stated:

> "Employment practices which disadvantage employees with Reserve obligations have become an increasing problem in recent years. Paragraph 1 of the bill will protect members of the Reserve components of the Armed Forces, including the National Guard, from such practices. It is designed to enable reservists and guardsmen who leave their jobs to perform training in the Armed Forces *to retain their employment and to enjoy all of the employment opportunities and benefits accorded their coworkers who do not . . . have a Reserve obligation.*
>
> "It assures that these reservists will be entitled to the same treatment afforded their coworkers without such military obligations . . . .
>
> "The law does not now protect these reservists against discharge without cause as it does with inductees and enlistees, who have 1-year protection, and initial active duty for training reservists, who have 6 months' protection.
>
> "To give the reservist a specific period of protection after each tour of training duty would be to perpetuate

> him in his position indefinitely. The new section . . . would not follow this approach but instead provides that an employee shall not be denied retention in his employment or any promotion or other incident or advantage of employment solely because of any obligation as a member of a Reserve component of the Armed Forces.
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> . . . . . .
>
> "If these young men are essential to our national defense, then certainly our Government and employers have a moral obligation to see that their economic well being is disrupted to the minimum extent possible." H. R. Rep. No. 1303, 89th Cong., 2d Sess., 3 (1966) (emphasis added).

Although the bill was passed by the House, 112 Cong. Rec. 5017 (1966), the Senate took no action on the measure during the 89th Congress.

The bill was reintroduced in the 90th Congress. H. R. 1093, 90th Cong., 1st Sess. (1967); S. 2561, 90th Cong., 1st Sess. (1967). Hearings again were held before Subcommittee No. 3 of the House Committee on Armed Services, at which a statement expressing the view of the American Legion was entered on the record:

> "The American Legion feels very strongly that employees with reserve obligations who are members of the National Guard and the Reserves . . . should be afforded *all the employment opportunities and benefits as those who do not have training obligations.* . . .
>
> "[The new section] would prevent discharge from employment without cause because of membership in the National Guard or Reserves, *and would also prevent discrimination in such areas as promotion, training opportunities and pay increases.*" Hearings on H. R. 1093 before Subcommittee No. 3 of the House Committee on Armed Services, 90th Cong., 1st Sess., 7477 (1968) (emphasis added).

Noting that protection of "reservists and guardsmen from being disadvantaged in employment because of their military obligations" was one of the purposes of the bill, the full Committee's favorable Report explained that "[s]ection (1) *amplifies* existing law to make clear that reservists not on active duty, who have a remaining Reserve obligation, whether acquired voluntarily or involuntarily, will nonetheless not be discriminated against by their employees [*sic*] soley [*sic*] because of such Reserve affiliation." H. R. Rep. No. 1303, 90th Cong., 2d Sess., 3 (1968) (emphasis added).

Following passage of the bill by the House, 114 Cong. Rec. 11779 (1968), the Senate Committee on Armed Services held hearings and issued a Report recommending enactment. The Report repeated the themes which run through every congressional expression on the statutory proposal:

> "This bill is intended . . . to prevent reservists and National Guardsmen not on active duty who must attend weekly drills or summer training from being discriminated against in employment because of their Reserve membership . . . .
>
> . . . . .
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> "Employment practices that discriminate against employees with Reserve obligations have become an increasing problem in recent years. Some of these employees have been denied promotions because they must attend weekly drills or summer training and others have been discharged because of these obligations. Section 1 of the bill is intended to protect members of the Reserve components of the Armed Forces from such practices. It provides that these reservists will be entitled to the same treatment afforded their coworkers not having such military obligations by requiring that employees with Reserve obligations 'shall not be denied retention in employment or other incident or advantage of employment because of any obligation as a member of a Reserve

component of the Armed Forces of the United States.'" S. Rep. No. 1477, 90th Cong., 2d Sess., 1–2 (1968).

The bill passed the Senate, 114 Cong. Rec. 24017 (1968), and became law on August 17, 1968. Pub. L. 90–491, 82 Stat. 790.

The legislative history of § 2021 (b)(3) admittedly reveals an intent to protect reservists from discharge because of their short-term absences, just as §§ 2021 (b)(1) and 2024 (c) safeguard returning veterans and reservists who are absent for more than three months. Yet the legislative history also indicates a more expansive congressional purpose of ensuring that reservists are not deprived of *any* employment benefit solely because of their willingness to serve their country.

II

The benefit at issue here is the opportunity to work a full 40-hour week. Both the District Court and the Court of Appeals concluded that being scheduled to work 40 hours per week is an "incident or advantage" of employment established by the custom and practice at respondent's refinery. 446 F. Supp. 616, 619 (ND Ohio 1978); 613 F. 2d 641, 645 (CA6 1980). Petitioner was treated no different from other employees in terms of work scheduling, and he was given the right to exchange shifts with willing fellow employees pursuant to the collective-bargaining agreement. Nevertheless, during those weeks when his scheduled work hours conflicted with his military commitments and he was unable to arrange an exchange of shifts, the opportunity granted him to work a full 40 hours was illusory since respondent "took no steps to provide [him] with substituted hours." App. 26. Thus, petitioner asserts that respondent violated 38 U. S. C. § 2021 (b)(3) by refusing to rearrange his work schedule to allow him to work 40 hours during those weeks when his military obligations otherwise precluded him from doing so. I agree.

The Court inaccurately characterizes petitioner's claim as seeking "work-schedule preferences not available to other em-

ployees." *Ante*, at 560. Respondent's policy is not to readjust the work schedule to accommodate absences for personal reasons, and petitioner alleges no right to special consideration regarding absences unrelated to military service. But if petitioner is to be placed on an equal footing with his co-workers, his military absences cannot be treated simply as personal leaves of absence. See *Carlson* v. *New Hampshire Dept. of Safety*, 609 F. 2d 1024, 1027 (CA1 1979), cert. denied, 446 U. S. 913 (1980); *Lott* v. *Goodyear Aerospace Corp.*, 395 F. Supp. 866, 869–870 (ND Ohio 1975). A reservist's absences for training result from obligations vital to our national defense that other employees have not assumed, and the primary purpose of the re-employment rights statutes is to protect reservists against disadvantages in employment caused by these obligations. Indeed, the essence of the statutory guarantees provided by Congress is that employers must give special treatment to the military absences of veterans and reservists.

The Court emphasizes that "respondent did not deny the petitioner anything that he would have received had he not been a reservist" since he was scheduled for 40 hours of work per week, was assigned the same burden of weekend and shift work as other employees, and was allowed to exchange shifts. *Ante*, at 565. In substance, the Court embraces the Court of Appeals' holding that § 2021 (b)(3) "merely requires that reservists be treated equally or neutrally with their fellow employees without military obligations." 613 F. 2d, at 646. However, unless the statute is read as safeguarding reservists from the adverse effects of facially neutral rules, much of its practical significance is lost. As the United States Court of Appeals for the Fifth Circuit observed in *West* v. *Safeway Stores, Inc.*, 609 F. 2d 147, 149 (1980): "The essence of reserve duty in this context is absence from work. If employers could . . . require that workers be present in order to receive certain benefits, then reservists could never secure the benefits or advantages of employment which the Act was

designed to protect." See also *Carney* v. *Cummins Engine Co.*, 602 F. 2d 763 (CA7 1979), cert. denied, 444 U. S. 1073 (1980).

Petitioner is not attempting to gain an advantage over his co-workers as a result of his reserve membership. He does not assert a right to be paid for hours he does not work, but asks only that he be given the same meaningful chance as other employees without military commitments to work full time in order to earn a living wage. Moreover, the record contains no evidence that it would be unduly burdensome for respondent, if given adequate notice, to accommodate petitioner's weekend military commitments in scheduling his work hours. In fact, counsel for respondent acknowledged at oral argument that petitioner "could be scheduled with the number of . . . Saturdays and Sundays off to accommodate his reserve obligation, without requiring any other employee in the plant to work any more Saturdays and Sundays than they now have to work under the regular routine." Tr. of Oral Arg. 27. See also App. 41–43 (proposed revision of work schedule).

The Court states that one of the flaws in petitioner's argument is that "there is no principled way of distinguishing between an employer's obligation to make scheduling accommodations for weekends as opposed to, for example, annual 2-week training periods, or even longer periods of training or duty." *Ante*, at 563. However, petitioner does not claim a right to make up hours, only to work full time during those weeks when he is available to work 40 hours apart from his reserve duties. Far from asking respondent to do the impossible, petitioner contends only that "reasonable steps" must be taken to accommodate him. Brief for Petitioner 24. Yet it is undisputed that respondent made *no* effort to do so. See App. 26. Cf. *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63 (1977). I cannot accept the Court's conclusion that such total indifference is in keeping with the underlying purposes and express guarantees of § 2021 (b)(3).

The Court's suggestion that respondent need go no further than the requirements of 38 U. S. C. § 2024 (d) in accommodating petitioner—*i. e.*, he must simply be provided "a leave of absence," *ante*, at 564—ignores the separate, broader protections of § 2021 (b)(3), which was enacted because § 2024 (d) was found to be inadequate. In the Court's view, "[i]f Congress had wanted to impose an additional obligation upon employers, guaranteeing that employee-reservists have the opportunity to work the same number of hours, or earn the same amount of pay that they would have earned without absences attributable to military reserve duties, it could have done so expressly." *Ante*, at 564. But it was respondent that conferred on its employees the benefit of 40 hours of work per week, and Congress has provided unequivocally that such a benefit cannot be refused a reservist, as it was here, solely because of his military commitments. The plain language of § 2021 (b)(3) does not differentiate among employment benefits, but "makes it . . . explicit that a reservist or guardsman cannot be . . . denied *any* promotion or other employment benefit or advantage, because of any obligation arising out of his membership in the reserves [or Guard], or because of his absences from work that result from such obligation." U. S. Dept. of Labor, Office of Veterans' Reemployment Rights, Veterans' Reemployment Rights Handbook 114–115 (1970) (emphasis added).

III

We have held that the re-employment rights statutes are "to be liberally construed for the benefit of those who . . . serve their country." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 285 (1946). Accord, *Coffy* v. *Republic Steel Corp.*, 447 U. S. 191, 196 (1980); *Alabama Power Co.* v. *Davis*, 431 U. S. 581, 584 (1977). It is unfortunate, I think, that the Court's decision today undermines that sound principle. The clear purpose of Congress in enacting § 2021 (b)(3) was to expand employment safeguards for reservists and thereby en-

courage participation in the Ready Reserves and the National Guard so as to strengthen our national defense effort without increased reliance on active duty personnel through mandatory military service. Yet that aim is severely frustrated if employers can deprive reservists of "an incident or advantage of employment" as important as the opportunity for full-time work undiminished by weekend absences for military training. Congress surely did not intend that petitioner be put to the choice of quitting the Reserves or forgoing the chance to earn the same wages as other employees who do not have military obligations. Section 2021 (b)(3) was enacted to prevent the very type of disadvantage that petitioner has suffered. Accordingly, I would reverse the judgment of the Court of Appeals.

UNITED STATES *v.* TURKETTE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 80-808. Argued April 27, 1981—Decided June 17, 1981

Chapter 96 of Title 18 of the United States Code, entitled Racketeer Influenced and Corrupt Organizations (RICO), was added to Title 18 by the Organized Crime Control Act of 1970. Title 18 U. S. C. § 1962 (c), which is part of RICO, makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." The term "enterprise" is defined in 18 U. S. C. § 1961 (4) as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." An indictment charged respondent and others with, *inter alia*, a conspiracy to violate § 1962 (c). The indictment described the enterprise in question as a group of individuals associated in fact for the purpose of engaging in certain specified criminal activities. Respondent was convicted in Federal District Court, but the Court of Appeals reversed on the ground that RICO was intended solely to protect legitimate business enterprises from infiltration by racketeers and does not make it criminal to participate in an association which performs only illegal acts and has not infiltrated or attempted to infiltrate a legitimate enterprise.

Held: The term "enterprise" as used in RICO encompasses both legitimate and illegitimate enterprises. Pp. 580-593.

(a) Neither the language nor structure of RICO limits its application to legitimate enterprises. On its face, the definition of "enterprise" in § 1961 (4) appears to include both legitimate and illegitimate enterprises within its scope. The section describes two separate categories of associations that come within the purview of an "enterprise"—the first encompassing organizations such as corporations, partnerships, and other "legal entities," and the second covering "any union or group of individuals associated in fact although not a legal entity." The second category is not a more generalized description of the first, and hence the rule of *ejusdem generis* cannot be properly applied to hold

that the second category should be limited by the specific examples enumerated in the first. Pp. 580–582.

(b) With respect to § 1962 (c), an "enterprise" is not a "pattern of racketeering activity" but is an entity separate and apart from the pattern of activity in which it engages. In order to secure a conviction, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." Pp. 582–583.

(c) Applying RICO to illegitimate as well as legitimate enterprises does not render any portion of the statute superfluous nor does it create any structural incongruities within the statute's framework. On the contrary, insulating the wholly criminal enterprise from prosecution under RICO is the more incongruous position. Pp. 583–587.

(d) Nothing in RICO's legislative history requires a conclusion that the statute is limited in its application to legitimate enterprises. In view of the purposes of the Organized Crime Control Act of 1970 to eradicate organized crime in the United States, it cannot be said that Congress nevertheless confined the reach of the law to only narrow aspects of organized crime, and, in particular, under RICO, to only the infiltration of legitimate business. Pp. 588–593.

632 F. 2d 896, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. STEWART, J., filed a dissenting statement, *post*, p. 593.

Mark I. Levy argued the cause for the United States. With him on the briefs were *Solicitor General McCree, Acting Assistant Attorney General Keeney, Deputy Solicitor General Frey,* and *Joel M. Gershowitz.*

John Wall argued the cause for respondent. With him on the brief was *Harry C. Mezer.**

JUSTICE WHITE delivered the opinion of the Court.

Chapter 96 of Title 18 of the United States Code, 18 U. S. C. §§ 1961–1968 (1976 ed. and Supp. III), entitled

*Briefs of *amici curiae* urging affirmance were filed by *Harvey A. Silverglate* for the Boston Bar Association et al.; and by *Barry Tarlow* for California Attorneys for Criminal Justice et al.

Racketeer Influenced and Corrupt Organizations (RICO), was added to Title 18 by Title IX of the Organized Crime Control Act of 1970, Pub. L. 91–452, 84 Stat. 941. The question in this case is whether the term "enterprise" as used in RICO encompasses both legitimate and illegitimate enterprises or is limited in application to the former. The Court of Appeals for the First Circuit held that Congress did not intend to include within the definition of "enterprise" those organizations which are exclusively criminal. 632 F. 2d 896 (1980). This position is contrary to that adopted by every other Circuit that has addressed the issue.[1] We granted certiorari to resolve this conflict. 449 U. S. 1123 (1981).

I

Count Nine of a nine-count indictment charged respondent and 12 others with conspiracy to conduct and participate in the affairs of an enterprise[2] engaged in interstate commerce

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[1] See *United States* v. *Sutton*, 642 F. 2d 1001, 1006–1009 (CA6 1980) (en banc), cert. pending, Nos. 80–6058, 80–6137, 80–6141, 80–6147, 80–6253, 80–6254, 80–6272; *United States* v. *Errico*, 635 F. 2d 152, 155 (CA2 1980); *United States* v. *Provenzano*, 620 F. 2d 985, 992–993 (CA3), cert. denied, 449 U. S. 899 (1980); *United States* v. *Whitehead*, 618 F. 2d 523, 525, n. 1 (CA4 1980); *United States* v. *Aleman*, 609 F. 2d 298, 304–305 (CA7 1979), cert. denied, 445 U. S. 946 (1980); *United States* v. *Rone*, 598 F. 2d 564, 568–569 (CA9 1979), cert. denied, 445 U. S. 946 (1980); *United States* v. *Swiderski*, 193 U. S. App. D. C. 92, 94–95, 593 F. 2d 1246, 1248–1249 (1978), cert. denied, 441 U. S. 933 (1979); *United States* v. *Elliott*, 571 F. 2d 880, 896–898 (CA5), cert. denied, 439 U. S. 953 (1978). See also *United States* v. *Anderson*, 626 F. 2d 1358, 1372 (CA8 1980), cert. denied, 450 U. S. 912 (1981). But see *United States* v. *Sutton*, 605 F. 2d 260, 264–270 (CA6 1979), vacated, 642 F. 2d 1001 (1980); *United States* v. *Rone*, *supra*, at 573 (Ely, J., dissenting); *United States* v. *Altese*, 542 F. 2d 104, 107 (CA2 1976) (Van Graafeiland, J., dissenting), cert. denied, 429 U. S. 1039 (1977).

[2] Title 18 U. S. C. § 1961 (4) provides:

"'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

through a pattern of racketeering activities, in violation of 18 U. S. C. § 1962 (d).[3] The indictment described the enterprise as "a group of individuals associated in fact for the purpose of illegally trafficking in narcotics and other dangerous drugs, committing arsons, utilizing the United States mails to defraud insurance companies, bribing and attempting to bribe local police officers, and corruptly influencing and attempting to corruptly influence the outcome of state court proceedings . . . ." The other eight counts of the indictment charged the commission of various substantive criminal acts by those engaged in and associated with the criminal enterprise, including possession with intent to distribute and distribution of controlled substances, and several counts of insurance fraud by arson and other means. The common thread to all counts was respondent's alleged leadership of this criminal organization through which he orchestrated and participated in the commission of the various crimes delineated in the RICO count or charged in the eight preceding counts.

After a 6-week jury trial, in which the evidence focused upon both the professional nature of this organization and the execution of a number of distinct criminal acts, respondent was convicted on all nine counts. He was sentenced to a term of 20 years on the substantive counts, as well as a 2-year special parole term on the drug count. On the RICO conspiracy count he was sentenced to a 20-year concurrent term and fined $20,000.

On appeal, respondent argued that RICO was intended

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[3] Title 18 U. S. C. § 1962 (d) provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." Pertinent to these charges, subsection (c) provides:

"It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

solely to protect legitimate business enterprises from infiltration by racketeers and that RICO does not make criminal the participation in an association which performs only illegal acts and which has not infiltrated or attempted to infiltrate a legitimate enterprise. The Court of Appeals agreed. We reverse.

II

In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). Of course, there is no errorless test for identifying or recognizing "plain" or "unambiguous" language. Also, authoritative administrative constructions should be given the deference to which they are entitled, absurd results are to be avoided and internal inconsistencies in the statute must be dealt with. *Trans Alaska Pipeline Rate Cases*, 436 U. S. 631, 643 (1978); *Commissioner* v. *Brown*, 380 U. S. 563, 571 (1965). We nevertheless begin with the language of the statute.

Section 1962 (c) makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." The term "enterprise" is defined as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." § 1961 (4). There is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact. On its face, the definition appears to include both legitimate and illegitimate enterprises within its scope; it no more ex-

cludes criminal enterprises than it does legitimate ones. Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, "legitimate." But it did nothing to indicate that an enterprise consisting of a group of individuals was not covered by RICO if the purpose of the enterprise was exclusively criminal.

The Court of Appeals, however, clearly departed from and limited the statutory language. It gave several reasons for doing so, none of which is adequate. First, it relied in part on the rule of *ejusdem generis*, an aid to statutory construction problems suggesting that where general words follow a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated. See 2A C. Sands, Sutherland on Statutory Construction § 47.17 (4th ed. 1973). The Court of Appeals ruled that because each of the specific enterprises enumerated in § 1961 (4) is a "legitimate" one, the final catchall phrase—"any union or group of individuals associated in fact"—should also be limited to legitimate enterprises. There are at least two flaws in this reasoning. The rule of *ejusdem generis* is no more than an aid to construction and comes into play only when there is some uncertainty as to the meaning of a particular clause in a statute. *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 588 (1980); *United States* v. *Powell*, 423 U. S. 87, 91 (1975); *Gooch* v. *United States*, 297 U. S. 124, 128 (1936). Considering the language and structure of § 1961 (4), however, we not only perceive no uncertainty in the meaning to be attributed to the phrase, "any union or group of individuals associated in fact" but we are convinced for another reason that *ejusdem generis* is wholly inapplicable in this context.

Section 1961 (4) describes two categories of associations that come within the purview of the "enterprise" definition. The first encompasses organizations such as corporations and partnerships, and other "legal entities." The second covers

"any union or group of individuals associated in fact although not a legal entity." The Court of Appeals assumed that the second category was merely a more general description of the first. Having made that assumption, the court concluded that the more generalized description in the second category should be limited by the specific examples enumerated in the first. But that assumption is untenable. Each category describes a separate type of enterprise to be covered by the statute—those that are recognized as legal entities and those that are not. The latter is not a more general description of the former. The second category itself not containing any specific enumeration that is followed by a general description, *ejusdem generis* has no bearing on the meaning to be attributed to that part of § 1961 (4).[4]

A second reason offered by the Court of Appeals in support of its judgment was that giving the definition of "enterprise" its ordinary meaning would create several internal inconsistencies in the Act. With respect to § 1962 (c), it was said:

> "If 'a pattern of racketeering' can itself be an 'enterprise' for purposes of section 1962 (c), then the two phrases 'employed by or associated with any enterprise' and 'the conduct of such enterprise's affairs through [a pattern of racketeering activity]' add nothing to the meaning of the section. The words of the statute are coherent and logical only if they are read as applying to legitimate enterprises." 632 F. 2d, at 899.

[4] The Court of Appeals' application of *ejusdem generis* is further flawed by the assumption that "any individual, partnership, corporation, association or other legal entity" could not act totally beyond the pale of the law. The mere fact that a given enterprise is favored with a legal existence does not prevent that enterprise from proceeding along a wholly illegal course of conduct. Therefore, since legitimacy of purpose is not a universal characteristic of the specifically listed enterprises, it would be improper to engraft this characteristic upon the second category of enterprises.

This conclusion is based on a faulty premise. That a wholly criminal enterprise comes within the ambit of the statute does not mean that a "pattern of racketeering activity" is an "enterprise." In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. 18 U. S. C. § 1961 (1) (1976 ed., Supp. III). The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.[5]

Apart from § 1962 (c)'s proscription against participating in an enterprise through a pattern of racketeering activities, RICO also proscribes the investment of income derived from racketeering activity in an enterprise engaged in or which

[5] The Government takes the position that proof of a pattern of racketeering activity in itself would not be sufficient to establish the existence of an enterprise: "We do not suggest that any two sporadic and isolated offenses by the same actor or actors *ipso facto* constitute an 'illegitimate' enterprise; rather, the existence of the enterprise as an independent entity must also be shown." Reply Brief for United States 4. But even if that were not the case, the Court of Appeals' position on this point is of little force. Language in a statute is not rendered superfluous merely because in some contexts that language may not be pertinent.

affects interstate commerce as well as the acquisition of an interest in or control of any such enterprise through a pattern of racketeering activity. 18 U. S. C. §§ 1962 (a) and (b).[6] The Court of Appeals concluded that these provisions of RICO should be interpreted so as to apply only to legitimate enterprises. If these two sections are so limited, the Court of Appeals held that the proscription in § 1962 (c), at issue here, must be similarly limited. Again, we do not accept the premise from which the Court of Appeals derived its conclusion. It is obvious that §§ 1962 (a) and (b) address the infiltration by organized crime of legitimate businesses, but we cannot agree that these sections were not also aimed at preventing racketeers from investing or reinvesting in wholly illegal enterprises and from acquiring through a pattern of racketeering activity wholly illegitimate enterprises such as an illegal gambling business or a loan-sharking

[6] Title 18 U. S. C. §§ 1962 (a) and (b) provide:

"(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

"(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

operation. There is no inconsistency or anomaly in recognizing that § 1962 applies to both legitimate and illegitimate enterprises. Certainly the language of the statute does not warrant the Court of Appeals' conclusion to the contrary.

Similarly, the Court of Appeals noted that various civil remedies were provided by § 1964,[7] including divestiture, dissolution, reorganization, restrictions on future activities by violators of RICO, and treble damages. These remedies it thought would have utility only with respect to legitimate enterprises. As a general proposition, however, the civil remedies could be useful in eradicating organized crime from the social fabric, whether the enterprise be ostensibly legitimate or admittedly criminal. The aim is to divest the association of the fruits of its ill-gotten gains. See *infra*, at 591–593. Even if one or more of the civil remedies might be inapplicable to a particular illegitimate enterprise, this fact would not serve to limit the enterprise concept. Congress has provided civil remedies for use when the circumstances so warrant. It is untenable to argue that their existence limits the scope of the criminal provisions.[8]

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[7] Title 18 U. S. C. §§ 1964 (a) and (c) provide:

"(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

. . . . . .

"(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

[8] In discussing these civil remedies, the Senate Report on the Organized Crime Control Act of 1970 specifically referred to two state cases in which

Finally, it is urged that the interpretation of RICO to include both legitimate and illegitimate enterprises will substantially alter the balance between federal and state enforcement of criminal law. This is particularly true, so the argument goes, since included within the definition of racketeering activity are a significant number of acts made criminal under state law. 18 U. S. C. § 1961 (1) (1976 ed., Supp. III). But even assuming that the more inclusive definition of enterprise will have the effect suggested,[9] the language of the statute and its legislative history indicate that Congress was well aware that it was entering a new domain of federal involvement through the enactment of this measure. Indeed, the very purpose of the Organized Crime Control Act of 1970 was to enable the Federal Government to address a large and seemingly neglected problem. The view was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions. That Congress included within the definition of racketeering activities a number of state crimes strongly indicates that RICO criminalized conduct that was also criminal under state law, at least when the requisite elements of a RICO offense are present. As the hearings and legislative debates reveal, Congress was well aware of the fear that RICO would "mov[e] large substantive areas formerly totally within the police power of

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equitable relief had been granted against illegitimate enterprises. S. Rep. No. 91–617, p. 79, n. 9, p. 81, n. 11 (1969). These references were in the context of a discussion on the need to expand the remedies available to combat organized crime.

[9] RICO imposes no restrictions upon the criminal justice systems of the States. See 84 Stat. 947 ("Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title"). Thus, under RICO, the States remain free to exercise their police powers to the fullest constitutional extent in defining and prosecuting crimes within their respective jurisdictions. That some of those crimes may also constitute predicate acts of racketeering under RICO, is no restriction on the separate administration of criminal justice by the States.

the State into the Federal realm." 116 Cong. Rec. 35217 (1970) (remarks of Rep. Eckhardt). See also *id.*, at 35205 (remarks of Rep. Mikva); *id.*, at 35213 (comments of the American Civil Liberties Union); Hearings on Organized Crime Control before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., 329, 370 (1970) (statement of Sheldon H. Eisen on behalf of the Association of the Bar of the City of New York). In the face of these objections, Congress nonetheless proceeded to enact the measure, knowing that it would alter somewhat the role of the Federal Government in the war against organized crime and that the alteration would entail prosecutions involving acts of racketeering that are also crimes under state law. There is no argument that Congress acted beyond its power in so doing. That being the case, the courts are without authority to restrict the application of the statute. See *United States* v. *Culbert*, 435 U. S. 371, 379–380 (1978).

Contrary to the judgment below, neither the language nor structure of RICO limits its application to legitimate "enterprises." Applying it also to criminal organizations does not render any portion of the statute superfluous nor does it create any structural incongruities within the framework of the Act. The result is neither absurd nor surprising. On the contrary, insulating the wholly criminal enterprise from prosecution under RICO is the more incongruous position.

Section 904 (a) of RICO, 84 Stat. 947, directs that "[t]he provisions of this Title shall be liberally construed to effectuate its remedial purposes." With or without this admonition, we could not agree with the Court of Appeals that illegitimate enterprises should be excluded from coverage. We are also quite sure that nothing in the legislative history of RICO requires a contrary conclusion.[10]

[10] We find no occasion to apply the rule of lenity to this statute. "[T]hat 'rule,' as is true of any guide to statutory construction, only serves as an aid for resolving an ambiguity; it is not to be used to beget one. . . . The rule comes into operation at the end of the process of

III

The statement of findings that prefaces the Organized Crime Control Act of 1970 reveals the pervasiveness of the problem that Congress was addressing by this enactment:

> "The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues

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construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, 364 U. S. 587, 596 (1961) (footnote omitted). There being no ambiguity in the RICO provisions at issue here, the rule of lenity does not come into play. See *United States* v. *Moore*, 423 U. S. 122, 145 (1975), quoting *United States* v. *Brown*, 333 U. S. 18, 25–26 (1948) (" 'The canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose. . . . Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers' "); see also *Lewis* v. *United States*, 445 U. S. 55, 60–61 (1980).

> to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact." 84 Stat. 922–923.

In light of the above findings, it was the declared purpose of Congress "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *Id.*, at 923.[11] The various Titles of the Act provide the tools through which this goal is to be accomplished. Only three of those Titles create substantive offenses, Title VIII, which is directed at illegal gambling operations, Title IX, at issue here, and Title XI, which addresses the importation, distribution, and storage of explosive materials. The other Titles provide various procedural and remedial devices to aid in the prosecution and incarceration of persons involved in organized crime.

Considering this statement of the Act's broad purposes, the construction of RICO suggested by respondent and the court below is unacceptable. Whole areas of organized criminal activity would be placed beyond the substantive reach of the enactment. For example, associations of persons engaged solely in "loan sharking, the theft and fencing of prop-

[11] See also 116 Cong. Rec. 602 (1970) (remarks of Sen. Yarborough) ("a full scale attack on organized crime"); *id.*, at 819 (remarks of Sen. Scott) ("purpose is to eradicate organized crime in the United States"); *id.*, at 35199 (remarks of Rep. Rodino) ("a truly full-scale commitment to destroy the insidious power of organized crime groups"); *id.*, at 35300 (remarks of Rep. Mayne) (organized crime "must be sternly and irrevocably eradicated").

erty, the importation and distribution of narcotics and other dangerous drugs," *id.*, at 922–923, would be immune from prosecution under RICO so long as the association did not deviate from the criminal path. Yet these are among the very crimes that Congress specifically found to be typical of the crimes committed by persons involved in organized crime, see 18 U. S. C. § 1961 (1) (1976 ed., Supp. III), and as a major source of revenue and power for such organizations. See Hearings on S. 30 et al. before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 1–2 (1969).[12] Along these same lines, Senator McClellan, the principal sponsor of the bill, gave two examples of types of problems RICO was designed to address. Neither is consistent with the view that substantive offenses under RICO would be limited to legitimate enterprises: "Organized criminals, too, have flooded the market with cheap reproductions of hit records and affixed counterfeit popular labels. They are heavily engaged in the illicit prescription drug industry." 116 Cong. Rec. 592 (1970). In view of the purposes and goals of the Act, as well as the language of the statute, we are unpersuaded that Congress nevertheless confined the reach of the law to only narrow aspects of organized crime, and, in particular, under RICO, *only* the infiltration of legitimate business.

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[12] See also *id.*, at 601 (remarks of Sen. Hruska); *id.*, at 606–607 (remarks of Sen. Byrd); *id.*, at 819 (remarks of Sen. Scott); *id.*, at 962 (remarks of Sen. Murphy); *id.*, at 970 (remarks of Sen. Bible); *id.*, at 18913, 18937 (remarks of Sen. McClellan); *id.*, at 35199 (remarks of Rep. Rodino); *id.*, at 35216 (remarks of Rep. McDade); *id.*, at 35300 (remarks of Rep. Mayne); *id.*, at 35312 (remarks of Rep. Brock); *id.*, at 35319 (remarks of Rep. Anderson of California); *id.*, at 35326 (remarks of Rep. Vanik); *id.*, at 35328 (remarks of Rep. Meskill); Hearings on S. 30 et al. before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 108 (1969) (statement of Attorney General Mitchell); H. R. Rep. No. 1574, 90th Cong., 2d Sess., 5 (1968).

This is not to gainsay that the legislative history forcefully supports the view that the major purpose of Title IX is to address the infiltration of legitimate business by organized crime. The point is made time and again during the debates and in the hearings before the House and Senate.[13] But none of these statements requires the negative inference that Title IX did not reach the activities of enterprises organized and existing for criminal purposes. See *United States* v. *Naftalin*, 441 U. S. 768, 774–775 (1979); *United States* v. *Culbert*, 435 U. S., at 377.

On the contrary, these statements are in full accord with the proposition that RICO is equally applicable to a criminal enterprise that has no legitimate dimension or has yet to acquire one. Accepting that the primary purpose of RICO is to cope with the infiltration of legitimate businesses, applying the statute in accordance with its terms, so as to reach criminal enterprises, would seek to deal with the problem at its very source. Supporters of the bill recognized that organized crime uses its primary sources of revenue and power—illegal gambling, loan sharking and illicit drug distribution—as a springboard into the sphere of legitimate enterprise. Hearings on S. 30, *supra*, at 1–2. The Senate Report stated:

> "What is needed here, the committee believes, are new approaches that will deal not only with individuals, but also with the economic base through which those individ-

[13] 116 Cong. Rec. 591 (1970) (remarks of Sen. McClellan) ("title IX is aimed at removing organized crime from our legitimate organizations"); *id.*, at 602 (remarks of Sen. Hruska) ("Title IX of this act is designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its members from control of legitimate businesses which have been acquired or operated by unlawful racketeering methods"); *id.*, at 607 (remarks of Sen. Byrd) ("alarming expansion into the field of legitimate business"); *id.*, at 953 (remarks of Sen. Thurmond) ("racketeers . . . gaining inroads into legitimate business"); *id.*, at 845 (remarks of Sen. Kennedy) ("title IX . . . may provide us with new tools to prevent organized crime from taking over legitimate businesses and activities"); S. Rep. No. 91-617, p. 76 (1969).

> uals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on *their source of economic power itself*, and the attack must take place on all available fronts." S. Rep. No. 91–617, p. 79 (1969) (emphasis supplied).

Senator Byrd explained in debate on the floor, that "loan sharking paves the way for organized criminals to gain access to and eventually take over the control of thousands of legitimate businesses." 116 Cong. Rec. 606 (1970). Senator Hruska declared that "the combination of criminal and civil penalties in this title offers an extraordinary potential for striking a mortal blow against the property interests of organized crime." *Id.*, at 602.[14] Undoubtedly, the infiltration

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[14] See also, *e. g.*, 115 Cong. Rec. 827 (1969) (remarks of Sen. McClellan) ("Organized crime . . . uses its ill-gotten gains . . . to infiltrate and secure control of legitimate business and labor union activities"); 116 Cong. Rec. 591 (1970) (remarks of Sen. McClellan) ("illegally gained revenue also makes it possible for organized crime to infiltrate and pollute legitimate business"); *id.*, at 603 (remarks of Sen. Yarborough) ("[RICO] is designed to root out the influence of organized crime in legitimate business, into which billions of dollars of illegally obtained money is channeled"); *id.*, at 606 (remarks of Sen. Byrd) ("loan sharking paves the way for organized criminals to gain access to and eventually take over the control of thousands of legitimate businesses"); *id.*, at 35193 (remarks of Rep. Poff) ("[T]itle IX . . . will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself . . ."); S. Rep. No. 91–617, *supra*, at 78–80; H. R. Rep. No. 1574, *supra*, at 5 ("The President's Crime Commission found that the greatest menace that organized crime presents is its ability through the accumulation of illegal gains to infiltrate into legitimate business and labor unions"); Hearings on Organized Crime Control before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., 170 (1970) (Department of Justice Comments) ("Title IX is designed to inhibit the infiltration of legitimate business by organized crime, and, like the previous title, *to reach the criminal syndicates' major sources of revenue*") (emphasis supplied).

of legitimate businesses was of great concern, but the means provided to prevent that infiltration plainly included striking at the source of the problem. As Representative Poff, a manager of the bill in the House, stated: "[T]itle IX . . . will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself . . . ." *Id.*, at 35193.

As a measure to deal with the infiltration of legitimate businesses by organized crime, RICO was both preventive and remedial. Respondent's view would ignore the preventive function of the statute. If Congress had intended the more circumscribed approach espoused by the Court of Appeals, there would have been some positive sign that the law was not to reach organized criminal activities that give rise to the concerns about infiltration. The language of the statute, however—the most reliable evidence of its intent—reveals that Congress opted for a far broader definition of the word "enterprise," and we are unconvinced by anything in the legislative history that this definition should be given less than its full effect.

The judgment of the Court of Appeals is accordingly

Reversed.

JUSTICE STEWART agrees with the reasoning and conclusion of the Court of Appeals as to the meaning of the term "enterprise" in this statute. See 632 F. 2d 896. Accordingly, he respectfully dissents.

DONOVAN, SECRETARY OF LABOR *v.* DEWEY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

No. 80-901. Argued April 28, 1981—Decided June 17, 1981

Section 103 (a) of the Federal Mine Safety and Health Act of 1977 requires federal mine inspectors to inspect underground mines at least four times a year and surface mines at least twice a year to ensure compliance with health and safety standards, and to make followup inspections to determine whether previously discovered violations have been corrected. The section also grants inspectors the right of entry to any coal or other mine and provides that no advance notice of an inspection need be given. If a mine operator refuses to allow a warrantless inspection under § 103 (a), the Secretary of Labor is authorized to bring a civil action for injunctive or other relief. When a federal inspector attempted a followup inspection of appellee company's stone quarries, appellee officer of the company refused to allow the inspection to continue. Subsequently, the Secretary of Labor filed suit in Federal District Court seeking to enjoin the company from refusing to permit warrantless searches of its facility. The District Court granted summary judgment for appellees on the ground that the Fourth Amendment prohibited the warrantless searches authorized by § 103 (a).

Held: The warrantless inspections required by § 103 (a) do not violate the Fourth Amendment but instead are reasonable within the meaning of that Amendment. Pp. 598–606.

(a) Unlike searches of private homes, which generally must be conducted pursuant to a warrant in order to be reasonable under the Fourth Amendment, legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate that Amendment. A warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme, and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes. Pp. 598–602.

(b) Here, in view of the substantial federal interest in improving the health and safety conditions in mines, and of Congress' awareness that the mining industry is among the most hazardous and that this industry's poor health and safety record has significant deleterious effects on

interstate commerce, Congress could reasonably determine that a system of warrantless inspections was necessary "if the law is to be properly enforced and inspection made effective." *United States* v. *Biswell*, 406 U. S. 311, 316. Pp. 602–603.

(c) Moreover, the statute's inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant. *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, distinguished. Pp. 603–604.

(d) The fact that stone quarries, as opposed to underground mines, do not have a long tradition of Government regulation, does not, in itself, mean that the warrantless inspection in question violated the Fourth Amendment. It is the pervasiveness and regularity of federal regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable under that Amendment. If the length of regulation were the only criterion, absurd results would occur which the Fourth Amendment's concept of reasonableness would not tolerate. Pp. 604–606.

493 F. Supp. 963, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 606. REHNQUIST, J., filed an opinion concurring in the judgment, *post*, p. 608. STEWART, J., filed a dissenting opinion, *post*, p. 609.

Deputy Solicitor General Geller argued the cause for appellant. With him on the briefs were *Solicitor General McCree, Acting Assistant Attorney General Martin, Elliott Schulder,* and *William Kanter.*

Francis R. Croak argued the cause for appellees. With him on the brief was *Jan E. Kearney.**

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*Briefs of *amici curiae* urging reversal were filed by *J. Albert Woll, Laurence Gold,* and *Marsha S. Berzon* for the American Federation of Labor and Congress of Industrial Organizations; and by *Fred Okrand, Mark D. Rosenbaum,* and *Dennis M. Perluss* for the ACLU Foundation of Southern California.

Wayne E. Bingham and *W. Thomas Martin, Jr.*, filed a brief for Kent Nowlin Construction, Inc., et al. as *amici curiae* urging affirmance.

JUSTICE MARSHALL delivered the opinion of the Court.

In this case we consider whether § 103 (a) of the Federal Mine Safety and Health Act of 1977, 30 U. S. C. § 813 (a) (1976 ed., Supp. III), which authorizes warrantless inspections of underground and surface mines, violates the Fourth Amendment. Concluding that searches conducted pursuant to this provision are reasonable within the meaning of the Fourth Amendment, we reverse the judgment of the District Court for the Eastern District of Wisconsin invalidating the statute.

I

The Federal Mine Safety and Health Act of 1977, 91 Stat. 1290, 30 U. S. C. § 801 *et seq.* (1976 ed. and Supp. III), requires the Secretary of Labor to develop detailed mandatory health and safety standards to govern the operation of the Nation's mines. 30 U. S. C. § 811 (1976 ed., Supp. III).[1] Section 103 (a) of the Act, 30 U. S. C. § 813 (a) (1976 ed., Supp. III), provides that federal mine inspectors are to inspect underground mines at least four times per year and surface mines at least twice a year to insure compliance with these standards, and to make followup inspections to determine whether previously discovered violations have been corrected. This section also grants mine inspectors "a right of entry to, upon, or through any coal or other mine" [2] and states that "no advance notice of an inspection shall be provided to any person." If a mine operator refuses to allow a warrantless inspection conducted pursuant to § 103 (a), the Secretary

[1] The Act supersedes the Federal Coal Mine Health and Safety Act of 1969, formerly 30 U. S. C. § 801 *et seq.*, and repeals and replaces the Federal Metal and Nonmetallic Mine Safety Act of 1966, formerly 30 U. S. C. § 721 *et seq.*

[2] The Act defines "coal or other mine" to include "an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground." 30 U. S. C. § 802 (h)(1) (1976 ed., Supp. III). It is undisputed that the quarry operated by appellee company falls within this definition.

is authorized to institute a civil action to obtain injunctive or other appropriate relief. 30 U. S. C. § 818 (a)(1)(C) (1976 ed., Supp. III).

In July 1978, a federal mine inspector attempted to inspect quarries owned by appellee Waukesha Lime and Stone Co. in order to determine whether all 25 safety and health violations uncovered during a prior inspection had been corrected. After the inspector had been on the site for about an hour, Waukesha's president, appellee Douglas Dewey, refused to allow the inspection to continue unless the inspector first obtain a search warrant. The inspector issued a citation to Waukesha for terminating the inspection,[3] and the Secretary subsequently filed this civil action in the District Court for the Eastern District of Wisconsin seeking to enjoin appellees from refusing to permit warrantless searches of the Waukesha facility.

The District Court granted summary judgment in favor of appellees on the ground that the Fourth Amendment prohibited the warrantless searches of stone quarries authorized by § 103 (a) of the Act.[4] 493 F. Supp. 963 (1980). The

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[3] The Act provides that the Secretary shall issue citations and propose civil penalties for violations of the Act or standards promulgated under the Act. 30 U. S. C. §§ 814 (a), 820 (a) (1976 ed., Supp. III). The Secretary's regulations call for issuance of a citation and the assessment of a civil penalty for denial of entry. 30 CFR § 100.4 (1980). The Act also allows a mine operator to contest any citation in a hearing before an administrative law judge, whose decision is subject to discretionary review by the Mine Safety and Health Review Commission. 30 U. S. C. §§ 815 (d), 823 (d) (1976 ed., Supp. III). The operator thereafter is entitled to review of a final administrative ruling in the appropriate court of appeals. 30 U. S. C. § 816 (1976 ed., Supp. III).

In this case, the Administrative Law Judge upheld a $1,000 civil penalty proposed by the Secretary. This decision is currently under review by the Mine Safety and Health Review Commission.

[4] Although the District Court limited its holding to the constitutionality of § 103 (a) as applied to warrantless inspections of stone quarries, the Act makes no distinction as to the type of mine to be inspected, and our

Secretary appealed directly to this Court pursuant to 28 U. S. C. § 1252. Because the District Court's ruling invalidated an important provision of the Mine Safety and Health Act, we noted probable jurisdiction.[5] *Sub nom. Marshall* v. *Dewey*, 449 U. S. 1122 (1981).

II

Our prior cases have established that the Fourth Amendment's prohibition against unreasonable searches applies to administrative inspections of private commercial property. *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307 (1978); *See* v. *City of Seattle*, 387 U. S. 541 (1967). However, unlike searches of private homes, which generally must be conducted pursuant to a warrant in order to be reasonable under the Fourth Amendment,[6] legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment. See, *e. g.*, *United States* v. *Biswell*, 406 U. S. 311 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72 (1970). The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an

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conclusions here apply equally to all warrantless inspections authorized by the Act.

[5] Three Courts of Appeals have upheld the warrantless inspection provisions of the Act as they apply to quarry operations similar to appellees' facility. See *Marshall* v. *Texoline Co.*, 612 F. 2d 935 (CA5 1980); *Marshall* v. *Nolichuckey Sand Co.*, 606 F. 2d 693 (CA6 1979), cert. denied, 446 U. S. 908 (1980); *Marshall* v. *Stoudt's Ferry Preparation Co.*, 602 F. 2d 589 (CA3 1979), cert. denied, 444 U. S. 1015 (1980).

[6] Absent consent or exigent circumstances, a private home may not be entered to conduct a search or effect an arrest without a warrant. *Steagald* v. *United States*, 451 U. S. 204 (1981); *Payton* v. *New York*, 445 U. S. 573 (1980); *Johnson* v. *United States*, 333 U. S. 10 (1948). Of course, these same restrictions pertain when commercial property is searched for contraband or evidence of crime. *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 352–359 (1977).

individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections. *United States* v. *Biswell, supra,* at 316.

The interest of the owner of commercial property is not one in being free from any inspections. Congress has broad authority to regulate commercial enterprises engaged in or affecting interstate commerce, and an inspection program may in some cases be a necessary component of federal regulation. Rather, the Fourth Amendment protects the interest of the owner of property in being free from *unreasonable* intrusions onto his property by agents of the government. Inspections of commercial property may be unreasonable if they are not authorized by law or are unnecessary for the furtherance of federal interests. *Colonnade Catering Corp.* v. *United States, supra,* at 77. Similarly, warrantless inspections of commercial property may be constitutionally objectionable if their occurrence is so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials. *Marshall* v. *Barlow's, Inc., supra, at* 323. "Where Congress has authorized inspection but made no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." *Colonnade Corp.* v. *United States, supra,* at 77. In such cases, a warrant may be necessary to protect the owner from the "unbridled discretion [of] executive and administrative officers," *Marshall* v. *Barlow's, Inc., supra,* at 323, by assuring him that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Camara* v. *Municipal Court,* 387 U. S. 523, 538 (1967).

However, the assurance of regularity provided by a warrant may be unnecessary under certain inspection schemes. Thus, in *Colonnade Corp.* v. *United States,* we recognized that because the alcoholic beverage industry had long been

"subject to close supervision and inspection," Congress enjoyed "broad power to design such powers of inspection . . . as it deems necessary to meet the evils at hand." 397 U. S., at 76–77. Similarly, in *United States* v. *Biswell*, this Court concluded that the Gun Control Act of 1968, 18 U. S. C. § 921 *et seq.*, provided a sufficiently comprehensive and predictable inspection scheme that the warrantless inspections mandated under the statute did not violate the Fourth Amendment. After describing the strong federal interest in conducting unannounced, warrantless inspections, we noted:

> "It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business . . . , he does so with the knowledge that his records, firearms, and ammunition will be subject to effective inspection. . . . The dealer is not left to wonder about the purposes of the inspector or the limits of his task." 406 U. S., at 316.

These decisions make clear that a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.

We re-emphasized this exception to the warrant requirement most recently in *Marshall* v. *Barlow's, Inc.* In that case, we held that absent consent a warrant was constitutionally required in order to conduct administrative inspections under § 8 (a) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § 657 (a). That statute imposes health and safety standards on all businesses engaged in or affecting interstate commerce that have employees, 29 U. S. C.

§ 652 (5), and authorizes representatives of the Secretary to conduct inspections to ensure compliance with the Act. 29 U. S. C. § 657 (a). However, the Act fails to tailor the scope and frequency of such administrative inspections to the particular health and safety concerns posed by the numerous and varied businesses regulated by the statute. Instead, the Act flatly authorizes administrative inspections of "any factory, plant, establishment, construction site, or other area, workplace, or environment where work is performed by an employee of an employer" and empowers inspectors conducting such searches to investigate "any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee." *Ibid.* Similarly, the Act does not provide any standards to guide inspectors either in their selection of establishments to be searched or in the exercise of their authority to search. The statute instead simply provides that such searches must be performed "at . . . reasonable times, and within reasonable limits and in a reasonable manner." *Ibid.*

In assessing this regulatory scheme, this Court found that the provision authorizing administrative searches "devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." 436 U. S., at 323. Accordingly, we concluded that a warrant was constitutionally required to assure a nonconsenting owner, who may have little real expectation that his business will be subject to inspection, that the contemplated search was "authorized by statute, and . . . pursuant to an administrative plan containing specific neutral criteria." *Ibid.* However, we expressly limited our holding to the inspection provisions of the Occupational Safety and Health Act, noting that the "reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute" and that some statutes "apply only to a single industry, where

regulations might already be so pervasive that a *Colonnade-Biswell* exception to the warrant requirement could apply." *Id.*, at 321.

Applying this analysis to the case before us, we conclude that the warrantless inspections required by the Mine Safety and Health Act do not offend the Fourth Amendment. As an initial matter, it is undisputed that there is a substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines. In enacting the statute, Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce.[7] Nor is it seriously contested that Congress in this case could reasonably determine, as it did with respect to the Gun Control Act in *Biswell*, that a system of warrantless inspections was

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[7] In the preamble to the Act, Congress declared:

"[T]here is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines. . . .

"[T]he existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal and other mining industry and cannot be tolerated. . . .

. . . . . .

"[T]he disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce." 30 U. S. C. §§ 801 (c), (d), (f).

These congressional findings were based on extensive evidence showing that the mining industry was among the most hazardous of the Nation's industries. See S. Rep. No. 95-181 (1977); H. R. Rep. No. 95-312 (1977). Although Congress did not make explicit reference to stone quarries in these findings, stone quarries were deliberately included within the scope of the statute. Since the Mine Safety and Health Act, unlike the Occupational Safety and Health Act, is narrowly and explicitly directed at inherently dangerous industrial activity, the inclusion of stone quarries in the statute is presumptively equivalent to a finding that the stone quarrying industry is inherently dangerous.

necessary "if the law is to be properly enforced and inspection made effective." *United States* v. *Biswell*, 406 U. S., at 316. In designing an inspection program, Congress expressly recognized that a warrant requirement could significantly frustrate effective enforcement of the Act. Thus, it provided in § 103 (a) of the Act that "no advance notice of an inspection shall be provided to any person." In explaining this provision, the Senate Report notes:

> "[I]n [light] of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained, a warrant requirement would seriously undercut this Act's objectives." S. Rep. No. 95–181, p. 27 (1977).

We see no reason not to defer to this legislative determination. Here, as in *Biswell*, Congress could properly conclude: "[I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection." 406 U. S., at 316.

Because a warrant requirement clearly might impede the "specific enforcement needs" of the Act, *Marshall* v. *Barlow's, Inc.*, 436 U. S., at 321, the only real issue before us is whether the statute's inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant. We believe that it does. Unlike the statute at issue in *Barlow's*, the Mine Safety and Health Act applies to industrial activity with a notorious history of serious accidents and unhealthful working conditions. The Act is specifically tailored to address those concerns,[8] and the regulation of mines it imposes is sufficiently pervasive and defined that the owner of such a facility cannot help but be aware that he "will be subject to effective inspection." *United States* v. *Biswell*, *supra*, at 316. First, the Act re-

[8] Cf. H. R. Rep. No. 95–312, *supra*, at 1 (mining operations are "so unique, so complex, and so hazardous as to not fit neatly under the Occupational Safety and Health Act").

quires inspection of *all* mines and specifically defines the frequency of inspection. Representatives of the Secretary must inspect all surface mines at least twice annually and all underground mines at least four times annually. 30 U. S. C. § 813 (a) (1976 ed., Supp. III). Similarly, all mining operations that generate explosive gases must be inspected at irregular 5-, 10-, or 15-day intervals. § 813 (i). Moreover, the Secretary must conduct followup inspections of mines where violations of the Act have previously been discovered, § 813 (a), and must inspect a mine immediately if notified by a miner or a miner's representative that a violation of the Act or an imminently dangerous condition exists. § 813 (g).[9] Second, the standards with which a mine operator is required to comply are all specifically set forth in the Act or in Title 30 of the Code of Federal Regulations. Indeed, the Act requires that the Secretary inform mine operators of all standards proposed pursuant to the Act. § 811 (e). Thus, rather than leaving the frequency and purpose of inspections to the unchecked discretion of Government officers, the Act establishes a predictable and guided federal regulatory presence. Like the gun dealer in *Biswell*, the operator of a mine "is not left to wonder about the purposes of the inspector or the limits of his task." 406 U. S., at 316.

Finally, the Act provides a specific mechanism for accommodating any special privacy concerns that a specific mine operator might have. The Act prohibits forcible entries, and instead requires the Secretary, when refused entry onto a mining facility, to file a civil action in federal court to obtain an injunction against future refusals. 30 U. S. C. § 818 (a) (1976 ed., Supp. III). This proceeding provides an

[9] In contrast, the inspection scheme considered in *Barlow's* did not require the periodic inspection of businesses covered by the Occupational Safety and Health Act, and instead left the decision to inspect within the broad discretion of agency officials. Thus, when a Government official attempted to inspect the facility in that case, the owner had no indication of "why an inspection of [his] establishment was within the program." 436 U. S., at 323, n. 20.

adequate forum for the mineowner to show that a specific search is outside the federal regulatory authority, or to seek from the district court an order accommodating any unusual privacy interests that the mineowner might have. See, *e. g.*, *Marshall* v. *Stoudt's Ferry Preparation Co.*, 602 F. 2d 589, 594 (CA3 1979) (inspectors ordered to keep confidential mine's trade secrets), cert. denied, 444 U. S. 1015 (1980).

Under these circumstances, it is difficult to see what additional protection a warrant requirement would provide. The Act itself clearly notifies the operator that inspections will be performed on a regular basis. Moreover, the Act and the regulations issued pursuant to it inform the operator of what health and safety standards must be met in order to be in compliance with the statute. The discretion of Government officials to determine what facilities to search and what violations to search for is thus directly curtailed by the regulatory scheme. In addition, the statute itself embodies a means by which any special Fourth Amendment interests can be accommodated. Accordingly, we conclude that the general program of warrantless inspections authorized by § 103 (a) of the Act does not violate the Fourth Amendment.

Appellees contend, however, that even if § 103 (a) is constitutional as applied to most segments of the mining industry, it nonetheless violates the Fourth Amendment as applied to authorize warrantless inspections of stone quarries. Appellees' argument essentially tracks the reasoning of the court below. That court, while expressly acknowledging our decisions in *Colonnade* and *Biswell*, found the exception to the warrant requirement defined in those cases to be inapplicable solely because surface quarries, which came under federal regulation in 1966,[10] do "not have a long tradition of government regulation." 493 F. Supp., at 964. To be sure, in *Colonnade* this Court referred to "the long history of the

[10] Stone quarries were first subjected to federal health and safety inspections under the Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U. S. C. §§ 723, 724.

regulation of the liquor industry," 397 U. S., at 75, and more recently in *Marshall* v. *Barlow's, Inc.*, 436 U. S., at 313, we noted that a "long tradition of close government supervision" militated against imposition of a warrant requirement. However, as previously noted, see *supra*, at 599, it is the pervasiveness and regularity of the federal regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment. Thus in *United States* v. *Biswell*, this Court upheld the warrantless search provisions of the Gun Control Act of 1968 despite the fact that "[f]ederal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry." 406 U. S., at 315. Of course, the duration of a particular regulatory scheme will often be an important factor in determining whether it is sufficiently pervasive to make the imposition of a warrant requirement unnecessary. But if the length of regulation were the only criterion, absurd results would occur. Under appellees' view, new or emerging industries, including ones such as the nuclear power industry that pose enormous potential safety and health problems, could never be subject to warrantless searches even under the most carefully structured inspection program simply because of the recent vintage of regulation.

The Fourth Amendment's central concept of reasonableness will not tolerate such arbitrary results, and we therefore conclude that warrantless inspection of stone quarries, like similar inspections of other mines covered by the Act, are constitutionally permissible. The judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE STEVENS, concurring.

Like JUSTICE STEWART, I believe the Court erred in *Camara* v. *Municipal Court*, 387 U. S. 523, when it overruled *Frank* v.

Maryland, 359 U. S. 360. See *post*, at 609 (dissenting opinion). I also share JUSTICE STEWART's conviction that each of us has a duty to accept the law as it is; disagreement with the holding in a prior case is not a sufficient reason for refusing to honor it.[1] Unlike him, however, I also think the Court erred in *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, when it concluded that *Camara* required it to invalidate the safety inspection program authorized by Congress in the Occupational Safety and Health Act. As I explained in my dissent in that case, neither the longevity of a regulatory program nor a businessman's implied consent to regulations imposed by the Federal Government determines the reasonableness of a congressional judgment that the public interest in occupational health or safety justifies a program of warrantless inspections of commercial premises. See 436 U. S., at 336–339 (STEVENS, J., dissenting).

JUSTICE STEWART has cogently demonstrated that the rationale of today's decision is much closer to the reasoning in my dissent than to the reasoning in the majority opinion in *Barlow's, Inc.* Nevertheless, I am not persuaded that the *holding* in *Barlow's, Inc.*, requires the Court to invalidate the program of mine inspections authorized by the statute we construe today.[2] I accept the Court's explanation of the differences between the scope of these statutes as sufficient to support a different result in this case. Because I agree with today's majority that the cases are distinguishable, I need not confront the more difficult question whether *Camara* represented such a fundamental misreading of the Fourth Amendment that it should be overruled. I would merely observe that that option is more viable today than when some of the

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[1] See *Florida Dept. of Health & Rehabilitative Services* v. *Florida Nursing Home Assn.*, 450 U. S. 147, 151 (STEVENS, J., concurring).

[2] I do not agree with JUSTICE STEWART's view that the doctrine of *stare decisis* requires that we respect dictum unnecessary to the decision in *Barlow's, Inc.* Cf. *McDaniel* v. *Sanchez*, *ante*, p. 154 (STEWART, J., dissenting).

reasoning that would support it could only be found in dissenting opinions, see 387 U. S., at 546–555 (Clark, J., dissenting); 436 U. S., at 325–339 (STEVENS, J., dissenting), or in the earlier Court opinion in *Frank* that had itself been overruled in *Camara*.

JUSTICE REHNQUIST, concurring in the judgment.

Our prior cases hold that, absent consent or exigent circumstances, the government must obtain a warrant to conduct a search or effect an arrest in a private home. *Steagald* v. *United States*, 451 U. S. 204 (1981); *Payton* v. *New York*, 445 U. S. 573 (1980). This case, however, involves the search of commercial property. Though the proprietor of commercial property is protected from unreasonable intrusions by governmental agents, the Court correctly notes that "legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment." *Ante*, at 598.

I do not believe, however, that the warrantless entry authorized by Congress in this case, § 103 (a) of the Federal Mine Safety and Health Act of 1977, can be justified by the Court's rationale. The Court holds that warrantless searches of stone quarries are permitted because the mining industry has been pervasively regulated. But I have no doubt that had Congress enacted a criminal statute similar to that involved here—authorizing, for example, unannounced warrantless searches of property reasonably thought to house unlawful drug activity—the warrantless search would be struck down under our existing Fourth Amendment line of decisions. This Court would invalidate the search despite the fact that Congress has a strong interest in regulating and preventing drug-related crime and has in fact pervasively regulated such crime for a longer period of time than it has regulated mining.

I nonetheless concur in the judgment of the Court. As far as I can tell, the stone quarry here was largely visible to the naked eye without entrance onto the company's property.

As this Court has held, the "protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields." *Hester* v. *United States*, 265 U. S. 57, 59 (1924). I necessarily reserve judgment on the extent to which the Fourth Amendment would prevent the implementation of § 103 (a) of the Act in the absence of the particular fact situation presented here.

JUSTICE STEWART, dissenting.

In *Frank* v. *Maryland*, 359 U. S. 360, the Court concluded that warrantless administrative inspections are not subject to the restrictions that the Fourth and Fourteenth Amendments place upon conventional searches. The *Frank* decision was overruled eight years later in *Camara* v. *Municipal Court*, 387 U. S. 523, over the dissent of three Members of the Court, of whom I was one. I believed then that the *Frank* case had been correctly decided, and that warrantless health and safety inspections do not "requir[e] . . . the safeguards necessary for a search of evidence of criminal acts." *Frank*, *supra*, at 372 (dissenting opinion).[1]

I must, nonetheless, accept the law as it is, and the law is now established that administrative inspections are searches within the meaning of the Fourth Amendment. As such, warrantless administrative inspections of private property without consent, are, like other searches, constitutionally invalid except in a few precisely defined circumstances. *Camara*, *supra*, at 528–529. This principle was re-emphasized most recently in *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, a case in which the Court carefully and explicitly defined the scope of the exception to the general rule of *Camara:* a search warrant is required for administrative inspections ex-

[1] This is not to say that evidence of criminality seized in the course of a warrantless administrative inspection should not be excluded at a criminal trial.

cept in those businesses with "a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." 436 U. S., at 313. Because the Court today departs far from this principle, I respectfully dissent.

A

In *Camara*, the Court announced the general rule that a warrantless inspection of a private dwelling by municipal administrative officers without proper consent is unconstitutional "unless it has been authorized by a valid search warrant." 387 U. S., at 528–529. In the companion case, *See* v. *City of Seattle*, 387 U. S. 541, the Court held that the general rule of *Camara* applies also to administrative inspections of commercial premises.

Until today, exceptions to the general rule have been found in only two cases. In *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72, the Court upheld against constitutional attack a statute that authorized warrantless searches of a liquor licensee's premises by Internal Revenue agents. And in *United States* v. *Biswell*, 406 U. S. 311, the Court held that federal Treasury agents could search the premises of a licensed gun dealer to determine whether he was in compliance with the Gun Control Act.

In *Marshall* v. *Barlow's, Inc.*, *supra*, the Court made clear that *Colonnade* and *Biswell* were only limited exceptions to the general rule of *Camara*, and that they did not signal a trend away from that rule. The Court stated that "unless some recognized exception to the warrant requirement applies," warrants for administrative inspections are mandatory. 436 U. S., at 313.

The *Barlow's* Court could not have been more clear in its explanation for and description of the *Colonnade-Biswell* exception: "*The* element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must be aware." 436 U. S., at 313 (emphasis

added). The rationale for the exception was unmistakably that of implied consent. The Court reasoned that "'[t]he businessman [in an industry with a long tradition of close government supervision] in effect consents to the restrictions placed upon him.'"[2] (quoting *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 271).

Thus, as explained in *Barlow's*, the *Colonnade-Biswell* exception is a single and narrow one: the exception applies to businesses that are both pervasively regulated *and* have a long history of regulation. Today the Court conveniently discards the latter portion of the exception.[3] Yet the very

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[2] In *Barlow's*, consent could not be found for inspections of the premises of the myriad businesses regulated by the Occupational Safety and Health Administration. The Court was unmoved by the Government's claims that warrantless inspections were necessary for effective enforcement, and that warrants would impose serious burdens upon the inspection system and the courts. 436 U. S., at 316–320. And the Court found similarly unpersuasive the Secretary of Labor's argument that a warrant requirement for OSHA inspections would mean that "as a practical matter, warrantless-search provisions in other regulatory statutes are also constitutionally infirm," *id.*, at 321.

[3] The Court's recasting of what the Court said in *Barlow's* is remarkable. After discussing *Colonnade* and *Biswell*, it states that those decisions create an exception to the warrant requirement when "Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Ante*, at 600. It then says that "this" exception to the warrant requirement was re-emphasized in *Barlow's*. *Ante*, at 600.

Nothing of the sort was re-emphasized in *Barlow's*. Rather, the Court re-emphasized that "[t]he element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must . . . be aware." 436 U. S., at 313.

The Court today does not, to be sure, rid its reinterpretation of *Colonnade* and *Biswell* of all traces of implied consent. It says that under its new test, "the owner . . . cannot help but be aware that his property will be subject to periodic inspections for specific purposes." *Ante*, at 600. But, as the Court must realize, this purported limitation is meaning-

rationale for the exception—that the "businessman . . . in effect consents to the restrictions placed upon him"—disappears without it. It can hardly be said that a businessman consents to restrictions on his business when those restrictions are not imposed until *after* he has entered the business. Yet, because it does not overrule *Barlow's*, that is precisely what the Court says today to many stone quarry operators.[4]

Under the peculiar logic of today's opinion, the scope of the Fourth Amendment diminishes as the power of governmental regulation increases. Yet I would have supposed that the mandates of the Fourth Amendment demand heightened, not lowered, respect, as the intrusive regulatory authority of government expands.

B

Because *Barlow's* states that the *Colonnade-Biswell* exception applies only when business is both pervasively regulated and has a long tradition of regulation, it follows that the exception does not apply to stone quarries, and that the Fourth Amendment requires that an inspection that is not consented to can be made only under the authority of a search warrant.[5]

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less. The Court never explains how operators of stone quarries could possibly be aware that the quarries would be subject to warrantless inspections until Congress told them they would be.

[4] The Court of Appeals for the Ninth Circuit correctly rejected the notion that the pervasiveness of regulation alone is enough to vitiate a quarry operator's reasonable expectation of privacy: "It would be far more accurate to state that [the] legislation and regulations . . . 'entered' [the operator's] business activity" than to state that the operator "subject[ed] himself to governmental supervision and regulation." *Marshall* v. *Wait*, 628 F. 2d 1255, 1259.

[5] Warrants are issued *ex parte*. If a warrant were sought after a mine operator's refusal to permit inspection, the time of execution of the warrant would not have to be made known to the operator. *Barlow's*, 436 U. S., at 320. And when it was anticipated that consent would not be given for a search, a warrant could be issued in accordance with an administrative plan based on specific neutral criteria in advance of the

Although quarries have existed at least since the beginning of the Republic, the District Court properly noted that it was only in 1966, when Congress added them to the scope of the Mine Safety and Health Act, that they became pervasively regulated. 493 F. Supp. 963, 965–966.

As I read today's opinion, Congress is left free to avoid the Fourth Amendment industry by industry even though the Court held in *Barlow's* that Congress could not avoid that Amendment all at once.[6] Congress after today can de-

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planned inspection. The Court's expressed fear that the obtaining of a warrant would give advance notice to a quarry operator of a forthcoming inspection is thus groundless.

Contrary to the Court's expressed belief today, *ante*, at 604–605, a warrant would not be an empty gesture, but would assure the quarry operator of the authority for the search and advise him of its scope and objectives. A warrant protects the proprietor's privacy interests by assuring him that a neutral judicial officer has reviewed the decision to inspect and found it "reasonable under the Constitution, . . . authorized by statute, and [made] pursuant to an administrative plan containing specific neutral criteria." *Barlow's*, 436 U. S., at 323. On the other hand, warrantless inspections will allow inspectors "almost unbridled discretion . . . as to when to search and whom to search," *ibid.*, precisely the type of arbitrary government interference with privacy that, it has been held in this context, the Fourth Amendment was designed to prevent. *Camara*, 387 U. S., at 528; *See* v. *City of Seattle*, 387 U. S. 541, 545.

[6] Factually, *Barlow's* and this case are nearly identical. Both cases arose when a business proprietor refused entry to a federal inspector who had come to conduct a warrantless health and safety inspection of business premises. In both cases, warrantless inspections were authorized by statute, § 8 (a) of the Occupational Health and Safety Act in *Barlow's* and § 103 (a) of the Federal Mine Safety and Health Act of 1977 in this case. Both statutes were similarly intended to improve health and safety standards in the Nation's workplaces, and their language is unmistakably parallel. Compare 29 U. S. C. § 651 *et seq.* with 30 U. S. C. § 801 *et seq.* (1976 ed., Supp. III).

Moreover, *Barlow's* cannot be distinguished from this case because MSHA relates to a specific industry, whereas the Occupational Safety and Health Act sought to regulate a far broader range of workplaces. MSHA, like the Occupational Safety and Health Act, relates to many different industries with widely disparate characteristics and occupational injury

fine any industry as dangerous, regulate it substantially, and provide for warrantless inspections of its members. But, because I do not believe that Congress can, by legislative fiat, rob the members of any industry of their constitutional protection, I dissent from the opinion and judgment of the Court.

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rates. Limestone quarries, sand and gravel operations, surface operations, and various noncoal underground mines are all quite distinct, and cannot be equivalent for constitutional purposes to underground coal mines. The Court today does not so much as mention the voluminous materials submitted by appellees and *amici* that show this to be true.

Syllabus

UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL–CIO, ET AL. *v.* LOCAL 334, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80–710. Argued April 29, 1981—Decided June 22, 1981

Held: A suit brought by respondent local union against petitioner parent international union alleging a violation of the international union's constitution arising from the international union's issuance of an order requiring consolidation of certain local unions, including respondent—which suit was instituted in state court but removed to federal court by the international union—falls within the jurisdiction of the federal district courts under § 301 (a) of the Labor Management Relations Act, 1947. That section establishes such jurisdiction for "[s]uits for violation of contracts . . . between any . . . labor organizations" representing employees in a covered industry. A union constitution is a "contract between labor organizations" and the unions are "labor organizations" within the plain meaning of § 301 (a), and there is no legislative history contrary to such an interpretation. Section 301 (a) jurisdiction over disputes between local and parent unions based on the parent's constitution does not depend upon allegations that the dispute potentially could have a significant impact on labor-management relations or industrial peace. Congress could have concluded that the enforcement of the terms of union constitutions—documents that prescribe the legal relationship and the rights and obligations between the parent and affiliated locals—would contribute to the achievement of labor stability. Pp. 619–627.

628 F. 2d 812, reversed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. BURGER, C. J., filed a dissenting opinion, *post*, p. 627. STEVENS, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 630.

Laurence Gold argued the cause for petitioners. With him on the briefs were *Donald J. Capuano, Robert Matisoff, George Kaufmann, Richard C. Cooper,* and *Timothy R. Hott.*

Jonathan G. Axelrod argued the cause for respondent Local 334, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. With him on the brief were *Hugh J. Beins,* and *Andrew F. Zazzali, Jr.*

JUSTICE BRENNAN delivered the opinion of the Court.

Section 301 (a) of the Labor Management Relations Act, 1947 (the Taft-Hartley Act) provides jurisdiction in the federal district courts over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or *between any such labor organizations.*" 61 Stat. 156, 29 U. S. C. § 185 (a) (emphasis added). The question presented in this case is whether a suit brought by a local union against its parent international union, alleging a violation of the international's constitution, falls within § 301 (a) jurisdiction of the federal district courts.

I

Respondent Local 334, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Local 334 or respondent), was a labor organization chartered by and affiliated with petitioner United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (International or United Association), an international labor organization.[1] Composed of both plumbers and pipefitters in Morris County, N. J., Local 334 was one of 27 New

[1] United Association has approximately 550 affiliated local unions and 335,000 members in the United States and Canada. 628 F. 2d 812, 813 (CA3 1980).

Jersey locals affiliated with the International prior to 1977. After failing in its attempt to urge the New Jersey locals to agree upon a voluntary consolidation plan, the International proposed its own plan that would consolidate nine northern New Jersey locals, including Local 334, into two locals, one representing plumbers, the other pipefitters.[2] Under the plan, the plumber members of Local 334 would be transferred into Plumbers Local 14, and the pipefitter members of Local 334 into Pipefitters Local 274.

When the locals declined to agree to the International's plan,[3] the International issued an order of consolidation on August 4, 1977, based on the proposed plan, pursuant to § 86 of the constitution of the United Association. That section, entitled "Consolidation of Locals," provides:

> "Whenever, in the judgment of the General President, it is apparent that there is a superfluous number of Local Unions in any locality, and that a consolidation would be for the best interest of the United Association, locally or at large, he shall have the power to order Local Unions to consolidate and to enforce the consolidation of said Local Unions, or said territory in one or more Local Unions, provided such course received the sanction of the General Executive Board." App. 25.

After receiving no response to a letter sent to the General Executive Board requesting a stay of the order pending ap-

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[2] The plan also transferred plumber members of other locals into Plumbers Local 14, and pipefitter members of other locals into Pipefitters Local 274. A third local, representing metal trades employees of the New Jersey Public Service Electric and Gas Co., was also established under the proposed plan. Local 334 members were not involved with this third local.

[3] On behalf of United Association, a hearing officer conducted a hearing at which each of the locals affected by the consolidation plan was allowed to present its view of the plan. Following the hearing, the officer recommended adoption of the proposed consolidation plan to United Association's general president.

peal, Local 334 on August 22, 1977, filed suit against the International in the Superior Court of New Jersey seeking to enjoin enforcement of the order of consolidation. Local 334 alleged in its complaint, *inter alia*, that § 86 did not permit division of the membership of a local into separate work classifications, that the action of United Association did not constitute a consolidation of local unions, and that the general president had abused his discretion. Complaint ¶ 11, *id.*, at 21. Claiming that it would suffer "substantial and irreparable injury to plaintiffs' [*sic*] property and property rights as members of Local 334" unless the consolidation was prevented, Complaint ¶ 13, *id.*, at 21, the Local requested equitable relief enjoining United Association to return the Local's charter and seal, directing it to process the Local's internal appeal to the International's General Executive Board, and preventing it from threatening the Local's officers and members with expulsion and loss of membership. *Id.*, at 22.[4]

The International removed the case to the United States District Court for the District of New Jersey, pursuant to 28 U. S. C. § 1441.[5] Local 334 filed a motion to remand the case to the state court, which the District Court denied. App. 98–99. Following completion of discovery and cross-motions for summary judgment, the District Court ruled in favor of the International. The court first concluded that it lacked jurisdiction to hear the case because the Local had failed

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[4] The Local subsequently amended its complaint, alleging in addition that the general president abused his discretion within the meaning of § 86 "by failing to specify facts which would support his conclusion that Local 334 is a 'superfluous' local union insofar as the Morris County, New Jersey area is concerned or that the elimination of Local 334 would be in the best interests of the United Association, locally or at large." Amended Complaint, Second Count ¶ 4, App. 61.

[5] Immediately following removal, Local 334 obtained a temporary restraining order against United Association enjoining enforcement of the order of consolidation. *Id.*, at 66–67. The temporary restraining order was subsequently dissolved when the District Court denied the Local's request for a preliminary injunction.

to exhaust internal union remedies. App. to Pet. for Cert. 22a–23a. In the alternative, the court ruled on the merits that there was "ample basis for the [International's] interpretation of the Constitution as well as the application of that interpretation in the Order of Consolidation of August 4, 1977." *Id.*, at 28a.

On appeal, the United States Court of Appeals for the Third Circuit, *sua sponte*, raised the question of federal-court jurisdiction under § 301 (a) and requested supplemental briefing on that issue from the parties. 628 F. 2d 812, 813 (1980). After canvassing treatment of this issue by other Courts of Appeals, the court held that "[s]uits concerning intra-union matters that do not have a significant impact on labor-management relations or industrial peace are outside the scope of § 301 (a)." *Id.*, at 820. Examining Local 334's allegations in its complaint, the court concluded that any alleged potential effect of the order of consolidation on labor-management relations or industrial peace would not pass the "significant impact" test and that the District Court therefore lacked jurisdiction under § 301 (a). *Ibid.* Accordingly, the court vacated the judgment of the District Court and remanded with instructions to remand the case to the state court. *Ibid.* We granted the International's petition for certiorari, 449 U. S. 1123 (1981), to resolve this important question of labor law. We reverse.

II

Section 301 (a) establishes federal district court jurisdiction for "[s]uits for violation of contracts . . . between any . . . labor organizations [representing employees in an industry affecting commerce as defined in this chapter]." 29 U. S. C. § 185 (a). On its face, the statute appears to comprehend the instant dispute. First, United Association's constitution may be fairly characterized as a contract between labor organizations. We have described a union constitution as a "fundamental agreement of association." *Coronado Coal Co.* v.

Mine Workers, 268 U. S. 295, 304 (1925);[6] see *Carbon Fuel Co.* v. *Mine Workers*, 444 U. S. 212, 217 (1979). The Courts of Appeals are unanimous that a union constitution can be a "contract between labor organizations" within the meaning of § 301 (a). See, *e. g.*, *Alexander* v. *International Union of Operating Engineers, AFL–CIO*, 624 F. 2d 1235, 1238 (CA5 1980); *Studio Electrical Technicians Local 728* v. *International Photographers of the Motion Picture Industries, Local 659*, 598 F. 2d 551, 553 (CA9 1979); *Local Union No. 657* v. *Sidell*, 552 F. 2d 1250, 1252–1256 (CA7), cert. denied, 434 U. S. 862 (1977); *Trail* v. *International Brotherhood of Teamsters*, 542 F. 2d 961, 968 (CA6 1976); *National Assn. of Letter Carriers, AFL–CIO* v. *Sombrotto*, 449 F. 2d 915, 918 (CA2 1971); *Parks* v. *International Brotherhood of Electrical Workers*, 314 F. 2d 886, 916–917 (CA4), cert. denied, 372 U. S. 976 (1963).[7]

[6] In *Coronado*, one of the issues in the case was whether the International union could be held liable for damages to property caused by a local strike called by an affiliated district organization. The International's constitution provided: "No district shall be permitted to engage in a strike involving all or a major portion of its members, without the sanction of an International Convention or the International Executive Board," and "Districts may order local strikes within their respective districts on their own responsibility, but where local strikes are to be financed by the International Union, they must be sanctioned by the International Executive Board." 268 U. S., at 299–300. Chief Justice Taft, writing for the Court, observed that "it must be clearly shown in order to impose . . . liability on [the International union] that what was done was done by their agents in accordance with their fundamental agreement of association." *Id.*, at 304.

[7] In *Smith* v. *United Mine Workers of America*, 493 F. 2d 1241, 1243 (1974) (emphasis added), the Court of Appeals for the Tenth Circuit appeared to suggest that the word "contracts" in § 301 did not encompass union constitutions, although the court also noted that the controversy in that case "relates only to the construction and application of the union constitution *and has nothing to do with labor-management relations*," thus leaving open the question whether a constitution affecting labor-management relations might be a "contract" in the view of that court.

The Court of Appeals for the First Circuit, without deciding, has given

Indeed, even the decision of the Court of Appeals for the Third Circuit on review here recognized that a union constitution would be a "contract" within the meaning of § 301 (a) as long as the plaintiff made "specific factual allegations of actions which have a significant impact on labor-management relations or industrial peace." 628 F. 2d, at 820.[8] And respondent in its complaint alleged that "[t]he relationship (rights and duties) between Local 334 and the International is governed by the said Constitution." Amended Complaint, First Count ¶ 3, App. 55.

We have also noted that the prevailing state-law view is that a union constitution is a contract. *Machinists* v. *Gonzales*, 356 U. S. 617, 618–619 (1958) (discussing that aspect of union constitution constituting a contract between members and union). In particular, the view of a union constitution as a contract *between* parent and local unions was widely held in the States around the time § 301 (a) was enacted. See, *e. g.*, *Locals 1140 and 1145* v. *United Electrical, Radio and Machine Workers of America*, 232 Minn. 217, 221–222, 45 N. W. 2d 408, 411 (1950); *International Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers of America, C. I. O.* v. *Becherer*, 4 N. J. Super. 456, 459, 67 A. 2d 900, 901, cert. denied, 3 N. J. 374, 70 A. 2d 537 (1949); *Local*

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strong indication that a union constitution can be a "contract" within the meaning of § 301 (a). In *Local Union 1219* v. *United Brotherhood of Carpenters and Joiners of America*, 493 F. 2d 93, 96 (1974), the court noted that a charter given by an international to a local union could be a "contract." The Court of Appeals for the District of Columbia Circuit, in *1199 DC, National Union of Hospital and Health Care Employees* v. *National Union of Hospital and Health Care Employees*, 175 U. S. App. D. C. 70, 72–73, 533 F. 2d 1205, 1207–1208 (1976), asserted that it "need not face the issue whether a union constitution is a § 301 (a) contract," absent the factual allegation of "actual threats to industrial peace."

[8] Even respondent concedes that a union constitution is a contract, albeit one "between members and their union and only secondarily . . . between affiliated bodies of a labor organization." Brief for Respondent 14–15, n. 10.

Union 13013, District 50, U. M. W. v. *Cikra*, 86 Ohio App. 41, 49, 90 N. E. 2d 154, 158 (1949); *Bridgeport Brass Workers Union, Local 320 of the International Union of Mine, Mill and Smelter Workers* v. *Smith*, 15 Conn. Supp. 505, 511–512 (Super. Ct. 1948), aff'd, 136 Conn. 654, 74 A. 2d 191 (1950); *Textile Workers Local 204* v. *Federal Labor Union No. 21500*, 240 Ala. 239, 243, 198 So. 606, 609 (1940). See also *Alexion* v. *Hollingsworth*, 289 N. Y. 91, 96–97, 43 N. E. 2d 825, 827 (1942). See generally 87 C. J. S., Trade Unions §§ 42–43, pp. 836–842, 837, n. 39, 838, n. 53 (1954).

Second, just as a union constitution is a "contract" within the plain meaning of § 301 (a), so too is it clear that United Association and Local 334 are "labor organization[s] representing employees in an industry affecting commerce as defined in this chapter." As defined in the Act, 29 U. S. C. § 152 (5), the term "labor organization" means

> "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

We have entertained numerous cases brought under § 301 (a) where one of the parties was an international union, see, *e. g.*, *Automobile Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696 (1966), or a local union, see, *e. g.*, *Drake Bakeries, Inc.* v. *Bakery & Confectionery Workers*, 370 U. S. 254 (1962). Indeed, in *Carbon Fuel Co.* v. *Mine Workers*, we did not even pause to question the existence of § 301 (a) jurisdiction in a suit brought by a coal company against an international union, an affiliated district union, and three affiliated local unions. 444 U. S., at 214.

If the plain meaning of the "contracts between labor organizations" clause of § 301 (a) supports jurisdiction in the instant case, its legislative history hardly upsets such an inter-

pretation. That is because there is no specific legislative history on that phrase to explain what Congress meant. The provision for suits between labor organizations was inserted late in the bill's history by the House-Senate Conference Committee. H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 65–66 (1947), 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, pp. 569–570 (hereafter Leg. Hist.); 93 Cong. Rec. 6445 (1947); 2 Leg. Hist., at 1535, 1543; see *Retail Clerks* v. *Lion Dry Goods, Inc.*, 369 U. S. 17, 26 (1962). The Conference Report and postconference debates contain no explanatory remarks about this addition. The only reference to the clause was made in a summary of the Act prepared by Senator Taft and inserted in the Congressional Record, which merely recited: "Section 301 differs from the Senate bill in two respects. Subsection (a) provides that suits for violation of contracts between labor organizations, as well as between a labor organization and an employer, may be brought in the Federal courts." 93 Cong. Rec. 6445 (1947), 2 Leg. Hist., at 1543.

Relying primarily on decisions from other Courts of Appeals, the Court of Appeals below was "persuaded by the view that disputes between local and parent unions must involve events which potentially have a significant impact on labor-management relations or industrial peace in order for there to be jurisdiction under § 301 (a)." 628 F. 2d, at 818. It is no doubt true that the primary purpose of the Taft-Hartley Act was "to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process." *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 509 (1962); see *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 452–455 (1957). As the Senate observed, "[s]tatutory recognition of the collective agreement as a valid, binding, and enforceable contract . . . will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace." S. Rep. No. 105, 80th Cong., 1st Sess., 17 (1947), 1 Leg. Hist., at 423.

But apparently Congress was also concerned that unions be made legally accountable for agreements into which they entered among themselves, an objective that itself would further stability among labor organizations. Therefore, § 301 (a) provided *federal* jurisdiction for enforcement of contracts made by labor organizations to counteract jurisdictional defects in many state courts that made it difficult or impossible to bring suits against labor organizations by reason of their status as unincorporated associations. See *Charles Dowd Box Co.* v. *Courtney, supra,* at 510; 93 Cong. Rec. 5014 (1947) (comments of Sen. Ball, a floor leader of the bill) ("because unions are voluntary associations, the common law in a great many States requires service on every member of the union, which is very difficult);[9] S. Rep. No. 105, *supra,* at 15, 1 Leg. Hist., at 421; Comment, Applying the "Contracts Between Labor Organizations" Clause of Taft-Hartley Section 301: A Plea for Restraint, 69 Yale L. J. 299, n. 2 (1959). Surely Congress could conclude that the enforcement of the terms of union constitutions—documents that prescribe the legal relationship and the rights and obligations between the parent and affiliated locals—would contribute to the achievement of labor stability. Since union constitutions were probably the most commonplace form of contract between labor organizations when the Taft-Hartley Act was enacted (and probably still are today), and Congress was obviously familiar with their existence and importance, we cannot believe that Congress would have used the unqualified term "contract" without intending to encompass that category of contracts represented by union constitutions. Nothing in the language and legislative history of § 301 (a) suggests any special quali-

[9] Congress carefully reviewed data compiled on the laws of the States as to the status of labor organizations as legal entities. See, *e. g.,* S. Rep. No. 105, 80th Cong., 1st Sess., 15–18 (1947), 1 Leg. Hist., at 421–424; H. R. Rep. No. 245, 80th Cong., 1st Sess., 108–109 (1947), 1 Leg. Hist., at 399–400.

fication or limitation on its reach, and we decline to interpose one ourselves.[10]

Respondent goes even further than the Court of Appeals view that only disputes with a "significant impact" on labor-management relations should trigger § 301 (a) jurisdiction, arguing that § 301 (a) should *never* extend to disputes arising under union constitutions because "[t]he 80th Congress clearly did not intend to intervene in the internal affairs of labor unions." Brief for Respondent 16–17. In support of its position, respondent cites several provisions of the Labor Management Relations Act,[11] some general statements in the legislative history,[12] and our decision in *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 184 (1967), where we observed in connection with § 8 (b)(2) of the Act[13] that "Con-

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[10] Respondent notes that, "had Congress intended in 1947 to make the provisions of a union's constitution enforceable in federal court, it could easily have done so explicitly." Brief for Respondent 13, n. 8. We find this a strange suggestion of statutory construction, for Congress specifically left the term "contracts" unqualified and inclusive. We also note that adoption of the "significant impact" test urged by the Court of Appeals would engage the federal courts in the sort of ad hoc judgments on the jurisdictional sufficiency of the pleadings that the unfettered language of § 301 (a) belies.

[11] Sections 8 (a)(3), 8 (b)(1)(A), and 8 (b)(2) of the Act, 29 U. S. C. §§ 158 (a)(3), (b)(1)(A), and (b)(2). For example, § 8 (b)(1)(A) states that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

[12] For example, Senator Ball, commenting on the proviso in § 8 (b)(1)(A), see n. 11, *supra*, stated: "It was never the intention of the sponsors of the pending amendment to interfere with the internal affairs or organization of unions." 93 Cong. Rec. 4272 (1947), 2 Leg. Hist., at 1141.

[13] Section 8 (b)(2) of the Act, 29 U. S. C. § 158 (b)(2), states:

"(b) It shall be an unfair labor practice for a labor organization and its agents—

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to dis-

gress expressly disclaimed . . . any intention to interfere with union self-government or to regulate a union's internal affairs." [14] Respondent's argument falls wide of the mark. There is an obvious and important difference between substantive regulation by the National Labor Relations Board of internal union governance of its membership, and enforcement by the federal courts of freely entered into agreements between separate labor organizations.[15] See *Parks* v. *International Brotherhood of Electrical Workers*, 314 F. 2d, at 915–916. In discussing the section in the Taft-Hartley Act on unfair labor practices with respect to the employer-union relationship, the House-Senate Conference stated: "Once parties have made a collective bargaining contract the *enforcement* of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 42 (1947) (emphasis added), 1 Leg. Hist., at 546; see *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95, 101, n. 9 (1962). Similarly, Congress chose in § 301 (a) to have contracts between labor organizations enforced by the federal courts.

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criminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . ."

[14] Respondent also cites the passage 12 years after the Taft-Hartley Act of the Landrum-Griffin Act of 1959, which we have described as "the first comprehensive regulation by Congress of the conduct of internal union affairs," *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S., at 193, as confirmation that, in the Taft-Hartley Act, Congress did not contemplate that § 301 (a) would reach union constitutions.

[15] In *Allis-Chalmers*, the issue was whether § 8 (b) (1) (A)'s prohibition of union activity to "restrain or coerce" employees in the exercise of their rights prevented the union from collecting fines from union members who declined to honor an authorized strike. We held that it did not, 388 U. S., at 195, and indeed suggested that the Act allowed court enforcement of reasonable fines, *id.*, at 192–193. *Allis-Chalmers* thus dealt with substantive regulation by the NLRB of internal union affairs, not with enforcement of pre-existing contracts in the federal courts.

We need not decide today what substantive law is to be applied in § 301 (a) cases involving union constitutions. It is enough to observe that the substantive law to apply "is federal law, which the courts must fashion from the policy of our national labor laws." *Textile Workers* v. *Lincoln Mills*, 353 U. S., at 456. Whether the source of that federal law will be state law, *id.*, at 457, see *Automobile Workers* v. *Hoosier Cardinal Corp.*, 383 U. S., at 704–705, or other principles can be left to another case.[16] But it is far too late in the day to deny that Congress intended the federal courts to enjoy wide-ranging authority to enforce labor contracts under § 301. We do not need to say that every contract imaginable between labor organizations is within § 301 (a). It is enough to hold, as we do now, that union constitutions are.

Reversed.

CHIEF JUSTICE BURGER, dissenting.

The Court holds today that union constitutions are "contracts between . . . labor organizations" within the meaning of § 301 (a) of the Labor Management Relations Act, 29 U. S. C. § 185 (a). To reach this result, the Court claims to rely on the plain meaning of the statute, uncontradicted by the legislative history. Unlike the Court, I cannot construe these simple English words in such a convoluted fashion. To me, it is abundantly clear that a union constitution is not a contract between labor organizations, and the legislative history confirms that this reading comports with Congress' intent in adopting the Act.

I agree with the Court, of course, that a union and its locals are "labor organizations" as defined by § 2 (5) of the Na-

[16] We also need not decide whether individual union members may bring suit on a union constitution against a labor organization. See generally *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962). Compare *Abrams* v. *Carrier Corp.*, 434 F. 2d 1234, 1247 (CA2 1970), cert. denied *sub nom. Steelworkers* v. *Abrams*, 401 U. S. 1009 (1971), with *Trail* v. *International Brotherhood of Teamsters*, 542 F. 2d 961, 968 (CA6 1976).

tional Labor Relations Act, 29 U. S. C. § 152 (5). I also am willing to accept, at least for purposes of this case, the Court's conclusion that a union constitution is a "contract." But I do not believe it reasonably can be described as a contract *between* labor organizations. To the extent a union constitution is a contract at all, it is a contract only between the union and its members or among the members themselves; it is not between the national or international union and its constituent locals. Although the degree of autonomy given locals may vary from union to union, they nonetheless are "subordinate bodies." Roomkin, Union Structure, Internal Control, and Strike Activity, 29 Ind. & Lab. Rel. Rev. 198, 199 (1976). "Local unions are *mere subdivisions* of the national organizations whose constitutions provide for their government as a state does for its counties, cities, towns, and villages." W. Leiserson, American Trade Union Democracy 87 (1959) (emphasis added). Accord, *id.*, at 280; Cook, Dual Government in Unions: A Tool for Analysis, 15 Ind. & Lab. Rel. Rev. 322, 330, 331 (1962). Thus, locals are creatures of the national or international union and, indirectly, of the workers. Obviously, then, union constitutions are not "contracts between . . . labor organizations"; the plain meaning of § 301 (a) does not confer jurisdiction over disputes arising out of violations of union constitutions.[1]

As we recently noted in *Rubin* v. *United States*, 449 U. S. 424, 430 (1981), "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete," unless unusual circumstances are present. One of those circumstances may be a clear indication in the legislative history that Congress intended some other meaning. Here, however, no such indication is present. The Court recognizes that "there is no specific legislative history on that phrase to explain what

[1] I intimate no view on whether a typical contract between a union and one of its locals—for example, for the sale of office equipment or the lease of property—would give rise to jurisdiction under § 301 (a).

Congress meant," *ante,* at 623; accordingly, the plain meaning, which does not confer jurisdiction over constitutional disputes, should govern. Indeed, JUSTICE BRENNAN, in the opinion for the Court in *NLRB* v. *Allis-Chalmers Mfg. Co.,* 388 U. S. 175, 185–187 (1967), amply demonstrated that the only discussion in the legislative history of regulating *internal* union matters indicates that the principal authors of the Act expressly disclaimed any intention of intervening in such disputes. See also *ante,* at 625–626.[2]

The Court attempts to explain these passages by saying that Congress, in enacting § 301 (a), merely was providing for the "enforcement . . . of freely entered into agreements . . . ." *Ante,* at 626. This is no answer when the Court also holds that the substantive law applicable " 'is federal law, which the courts must fashion from the policy of our national labor laws.' " *Ante,* at 627 (quoting *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 456 (1957)). Similarly, remarks in Committee Reports and on the floor regarding the accountability of unions for their agreements were all made in relation to collective-bargaining agreements with employers; there is no reference to a local's invoking the jurisdiction of the federal courts to enforce the provisions of union constitutions. Thus, the legislative history is fully consistent with holding that a union constitution is not a contract between labor organizations as such.

It is not irrelevant that, 12 years after the adoption of the Labor Management Relations Act in 1947, Congress expressly chose to engage in regulation of internal union matters by enacting the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 (codified at 29 U. S. C. § 401 *et seq.*).[3] The Court has recognized before that the 1959 Act

[2] Although these remarks were made with reference to another provision of the Act, they indicate that congressional silence, if anything, betokens *no* intent to subject internal union disputes to federal regulation.

[3] Of course, it is seldom, if ever, proper to construe a statute on the basis of statements made in subsequent Congresses. Nevertheless, as

was "the *first* comprehensive regulation by Congress of the conduct of *internal* union affairs . . . ." *NLRB* v. *Allis-Chalmers Mfg. Co., supra,* at 193 (emphasis added). Moreover, the careful construction and the comprehensiveness of the provisions adopted in 1959 lead to a presumption that Congress deliberately excluded from the regulatory scheme other remedies regarding internal union disputes. See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 644–645 (1981); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77, 97 (1981).[4]

When examined in terms of its plain meaning, its legislative history, and the whole fabric of federal labor law, § 301 (a) clearly does not confer jurisdiction over disputes under union constitutions. Moreover, the Court's decision today invites resort to the federal courts for cases better resolved outside the federal judiciary. Accordingly, I dissent.

JUSTICE STEVENS, with whom JUSTICE REHNQUIST joins, dissenting.

Congress has defined the essential elements of the Nation's labor policy by creating certain basic federal rights and providing procedures for their enforcement. To enable the fed-

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JUSTICE BRENNAN, writing for the Court in *NLRB* v. *Drivers*, 362 U. S. 274, 291 (1960) (emphasis added), stated:

"To be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration. Courts may properly take into account the later Act when asked to *extend the reach of the earlier Act's vague language* . . . ."

Assuming, *arguendo*, that § 301 (a) is vague, the adoption of provisions regulating internal union matters becomes relevant.

[4] The Court also relies on state cases that have treated union constitutions as contracts. *Ante*, at 621–622. How state courts, which have plenary authority to construe and develop the common law of contracts, regard union constitutions has little bearing on the construction of the Labor Management Relations Act.

eral courts to carry out that basic policy, the Court in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, construed § 301 (a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185 (a), as a grant of authority to fashion substantive rules of law concerning the making and enforcement of contracts between management and labor. The question this case presents is whether that statute conferred any such lawmaking power on the federal courts in cases arising out of contracts between two labor organizations.

In *Textile Workers* v. *Lincoln Mills, supra,* the Court was presented with the question whether § 301 (a), which "is drafted in terms which appear to be exclusively jurisdictional," *Textile Workers Union* v. *American Thread Co.*, 113 F. Supp. 137, 139 (Mass. 1953), was meant by Congress to be an authorization for "federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements . . . ." 353 U. S., at 451. After examining the legislative history of § 301, the Court concluded that Congress intended to make collective-bargaining agreements between unions and employers binding on both parties and, more importantly, to provide for a "procedure for making such agreements enforceable in the courts by either party." *Id.*, at 453.[1]

[1] The Court admitted that the legislative history of § 301 is "somewhat cloudy and confusing" but found "a few shafts of light to illuminate our problem." 353 U. S., at 452. The Court noted that the Conference Committee had dropped a provision which would have made the failure to abide by an agreement to arbitrate an unfair labor practice because "the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 42 (1947); 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, p. 546 (hereinafter Legislative History). Both the Senate Report and the House Report indicated that collective-bargaining agreements should be binding and enforceable in the courts by either party. See 353 U. S., at 453. Moreover, Congress wanted to promote the inclusion of no-strike clauses in collective-bargaining agreements:

"The chief advantage which an employer can reasonably expect from a

Because Congress had unambiguously declared its purpose to encourage the collective-bargaining process by making collective-bargaining agreements enforceable by the Judiciary, see *id.*, at 453–456, the Court concluded that the remedy fashioned by the District Court, specific performance of an agreement to arbitrate a dispute over a grievance, was a proper implementation of the national policy that Congress had defined. Thus the Court's holding that a federal court could order specific enforcement of such an agreement created a new rule of law not supported by express statutory authority. Rather it was one example of the "range of judicial inventiveness" implicitly authorized by Congress. *Id.*, at 457. The Court also concluded that such authorization was not unconstitutional, because "[t]he power of Congress to regulate these labor-management controversies under the Commerce Clause is plain." *Ibid.*[2]

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collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract." S. Rep. No. 105, 80th Cong., 1st Sess., 16 (1947) (hereinafter 1947 Senate Report), 1 Legislative History, at 422.

Because agreements to arbitrate are the *quid pro quo* of a no-strike clause, the Court concluded that Congress intended agreements to arbitrate to be enforceable under § 301. 353 U. S., at 455.

[2] The Court cited *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, for that proposition. In that case, decided in 1937, the Court sustained the constitutionality of the National Labor Relations Act as a valid exercise of Congress' power under the Commerce Clause. The Court stated:

"When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a

Two important conclusions may be derived from the Court's opinion in *Lincoln Mills*. First, underlying the Court's holding was the settled principle that because of the effect of collective-bargaining agreements on industrial peace, the regulation of those agreements is a permissible exercise of Congress' power under the Commerce Clause. Therefore, if § 301 authorized the creation of federal common law, then cases brought pursuant to that section would be cases "arising under" the "laws" of the United States within the meaning

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practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.

"Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife." *Id.*, at 41–42.

Thus 20 years later, when *Lincoln Mills* was decided, it was well settled that labor-management relations had an effect on interstate commerce. Moreover, although the legislative history of the LMRA is "cloudy and confusing" as to the question whether § 301 was substantive or jurisdictional, the legislative history of the statute and of § 301 in particular clearly indicates that the enforcement of collective-bargaining agreements has an effect on industrial peace and therefore on interstate commerce. The primary purpose of the Act was "to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process." *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 509. With respect to the subject matter of § 301 the Senate Report stated:

"[T]o encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts.

. . . . . .

"Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace." 1947 Senate Report, at 16–17, 1 Legislative History, at 422–423.

of Art. III, § 2, of the Constitution.[3] Second, the legislative history of § 301 provided the basis for the Court's conclusion that § 301 was not merely a grant of jurisdiction in cases involving agreements between unions and employers but rather was a congressional authorization for the federal courts to create substantive rules to promote the important federal interests underlying the enforcement of collective-bargaining agreements. Therefore, the federal interest in industrial peace and the authorization to federal courts under § 301 to create rules to enforce collective-bargaining agreements have together resulted in the creation of federal rights for both unions and employers.[4]

Neither of the basic conclusions emerging from *Lincoln Mills* is applicable to suits on contracts between labor unions. First, there is no indication in the statute that Congress has concluded that disputes over contracts between unions present the threat to industrial peace sufficient to justify Congress' exercise of its power under the Commerce Clause.[5]

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[3] The Court did not rely on the view that § 301 had the effect of making a labor union a federal entity comparable to a national bank, with the consequence that a potential federal question concerning its authority might arise in any litigation to which it was a party, thus providing a basis for federal jurisdiction whenever a union was a litigant. See *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Lincoln Mills*, 353 U. S., at 470–473 (Frankfurter, J., dissenting).

[4] "In the 1947 Taft-Hartley Act Congress sought to promote numerous policies. One policy of particular importance—if not the overriding one—was the policy of free collective bargaining. See *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95, 104 (1962); *NLRB* v. *Insurance Agents*, 361 U. S. 477, 488 (1960); *Textile Workers* v. *Lincoln Mills*, *supra*, at 453–454." *Carbon Fuel Co.* v. *Mine Workers*, 444 U. S. 212, 218.

[5] Although it need not have looked beyond the legislative history of the Labor Management Relations Act to conclude that regulation of collective-bargaining agreements affect industrial peace, the *Lincoln Mills* Court cited *Jones & Laughlin*, *supra*, a case construing the NLRA, for that proposition. In this case, however, the Court has pointed to no other decisional or statutory authority indicating that all agreements be-

More importantly, even were there such indication, the legislative history of § 301 provides no support for a conclusion that Congress intended the courts to create substantive law to govern contractual disputes between unions. The legislative history of the clause relating to agreements between labor organizations does not contain even the "few shafts of light" which the Court in *Lincoln Mills* found helpful in construing the clause relating to contracts between employers and unions. As the Court recognizes, *ante*, at 623, "there is no specific legislative history on the phrase to explain what Congress meant." The absence of such legislative history dictates the conclusion that Congress intended the clause "or between any such labor organizations" to be a mere grant of jurisdiction over all cases arising out of contracts between unions in which a federal question otherwise exists.[6] There is no justification for the conclusion that Congress perceived contracts between unions to involve any federal interest sufficient to warrant the creation of federal rights.

As the Court construes the statute, however, it purports to confer authorization on federal courts to create substantive

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tween unions have an effect on industrial peace and thus on interstate commerce.

[6] The only reference to the clause in the legislative history, in a summary of the Act prepared by Senator Taft and inserted in the Congressional Record, does not indicate that the clause is anything more than jurisdictional:

"Section 301 differs from the Senate bill in two respects. Subsection (a) provides that suits for violation of contracts between labor organizations, as well as between a labor organization and an employer, may be brought in the Federal courts." 93 Cong. Rec. 6445 (1947), 2 Legislative History, at 1543.

Although this sentence refers also to the clause relating to agreements between a labor organization and an employer—a clause which is more than a grant of jurisdiction—the additional legislative history with respect to such agreements provides some justification for concluding that that portion of § 301 is substantive. No such justification is present, however, with respect to agreements between labor unions.

federal common law to govern disputes between two unions over a union constitution. The local union in this case, however, has no federal right to autonomy and the international has no federal right to consolidate its locals. Congress has identified no national policy favoring or disfavoring the consolidation of local unions.[7] Unless contracts between unions have some form of federal protection, the statute as the Court construes it is the equivalent of a statute authorizing federal jurisdiction over all litigation between people named Smith, Jones, or Stevens. Some such cases would present federal questions; some would not.[8] One union may rent office space to another, lend it money, or manage its credit union. No federal power is implicated by contracts of that kind,[9] and no

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[7] The test adopted by the Court of Appeals in this case required district courts to identify a "significant impact on labor-management relations or industrial peace" prior to exercising jurisdiction under § 301. See 628 F. 2d 812, 820. The Court of Appeals found no such impact. In *Lincoln Mills* the Court not only found a federal interest in the enforcement of collective-bargaining agreements but also specifically found a federal interest in enforcing the clause requiring arbitration at issue there. Because Congress was desirous of promoting agreements not to strike, and because agreements to arbitrate are the *quid pro quo* for agreements not to strike, the Court could infer a congressional belief that industrial peace could be fostered by the enforcement of such arbitration agreements. See 353 U. S., at 455.

[8] Because § 301 indisputably grants jurisdiction over contract actions between two unions, there is of course no need to give the statute the broad reading given it by the Court in any case in which there is otherwise a federal question and the case thus otherwise arises under federal law.

[9] Although the Court states, *ante*, at 627, that "[w]e do not need to say that every contract imaginable between labor organizations is within § 301 (a)," the Court cannot so easily limit its opinion. The Court's opinion permits the creation of federal law in a dispute implicating no federal interest. Absent a limitation restricting § 301 (a) jurisdiction on the basis of the presence of a federal interest or right, it will be difficult for district courts to determine what contracts are not encompassed by § 301 (a).

federal rights support the conclusion that courts with the limited jurisdiction described in Art. III of the Constitution may adjudicate issues arising out of such contracts.[10]

The conclusion that suits on contracts between labor unions are not cases "arising under" federal law is further illustrated by the choice of law that district courts would have to make in such cases. The Court states, *ante*, at 627, that courts must follow the command of *Lincoln Mills* by fashioning the federal law by looking to the "'policy of our national labor laws.'" See *Lincoln Mills*, 353 U. S., at 456. But in explaining the conclusion that federal interests justified the creation of a body of law to govern the enforceability of collective-bargaining agreements, the *Lincoln Mills* Court indicated that the broad lawmaking powers would be limited and guided by "the penumbra of express statutory mandates" and "by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." *Id.*, at 457. Five years later, in *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95, the Court indicated that this national policy was best served by the establishment of a uniform body of law applicable to § 301 suits and held that state courts deciding § 301 suits must apply the federal common law.[11] In the context presented by

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[10] If the statute is read the way that the Court reads it, its constitutionality is suspect, because the statute purports to give the federal courts jurisdiction over suits which are not "arising under" federal law within the meaning of Art. III, § 2, of the Constitution. Because, however, "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available," *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 500, and because I accordingly interpret the statute to be no more than a grant of jurisdiction, I would not reach the constitutional question.

[11] The Court recognized the federal interest in uniformity:

"[T]he subject matter of § 301 (a) 'is peculiarly one that calls for uniform law.' *Pennsylvania R. Co.* v. *Public Service Comm'n*, 250 U. S. 566, 569; see *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, 167–169. The possibility that individual contract terms might have different meanings under

this case, however, because the statute does not give a clue as to the federal interest regarding contracts between unions, and because there is thus no federal scheme to follow, district courts will have little choice but to borrow state law.[12] Moreover, in the absence of some guideposts planted in federal interests, the ability to obtain—and the need for—uniformity will be greatly reduced. It is difficult to conceive how the Nation's interest in industrial peace will be served by the creation of a body of federal law which will be based on state law and which will in large part vary from State to State.

I believe that this case presents no substantive federal ques-

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state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.

. . . . .

"The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. With due regard to the many factors which bear upon competing state and federal interests in this area, *California* v. *Zook*, 336 U. S. 725, 730–731; *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230–231, we cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." 369 U. S., at 104–105.

[12] The petitioners agree that the "federal common law" will be borrowed from state law, and as the following statement by petitioners' counsel at oral argument illustrates, existing federal law may contribute little to the formulation of the new "federal" rule:

"Where the federal courts have to create a body of law, we don't believe that the normal course is to start from scratch. It's a process of incorporation except in the case of incompatibility. It's difficult for me to visualize an incompatibility between federal law and state law if the dispute is on whether a local union which owes another local union that is unrelated $500 has in fact violated a promissory note." Tr. of Oral Arg. 16.

tion.[13] The case does not arise under "the laws of the United States," and the Court of Appeals was quite right in holding that it had no subject-matter jurisdiction.

I respectfully dissent.

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[13] This case is important not because of its unremarkable holding that a union constitution is a contract but because the case is a striking example of the easy way in which this Court enlarges the power of the Federal Government—and the Federal Judiciary in particular—at the expense of the States.

HEFFRON, SECRETARY AND MANAGER OF THE MINNESOTA STATE AGRICULTURAL SOCIETY BOARD OF MANAGERS, ET AL. *v.* INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., ET AL.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA

No. 80-795. Argued April 20, 1981—Decided June 22, 1981

A rule (Rule 6.05) of the Minnesota Agricultural Society (Society), a Minnesota public corporation that operates the annual state fair, provides that sale or distribution of any merchandise, including printed or written material, except from a duly licensed location on the fairgrounds shall be a misdemeanor. As Rule 6.05 is construed and applied by the Society, all persons, groups, or firms desiring to sell, exhibit, or distribute materials during the fair must do so only from fixed locations. However, the Rule does not prevent organizational representatives from walking about the fairgrounds and communicating the organization's views to fair patrons in face-to-face discussions. Space in the fairgrounds is rented in a nondiscriminatory fashion on a first-come, first-served basis, and Rule 6.05 applies alike to nonprofit, charitable, and commercial enterprises. Respondents, International Society for Krishna Consciousness, Inc. (ISKCON), an organization espousing the views of the Krishna religion, and the head of one of its temples, filed suit in a Minnesota state court against state officials, seeking declaratory and injunctive relief on the ground that Rule 6.05, on its face and as applied, violated their First Amendment rights. ISKCON asserted that the Rule suppressed the practice of Sankirtan, a religious ritual that enjoins its members to go into public places to distribute or sell religious literature and to solicit donations for the support of the Krishna religion. The trial court upheld the constitutionality of Rule 6.05, but the Minnesota Supreme Court reversed.

Held: Rule 6.05, requiring members of ISKCON who desire to practice Sankirtan at the state fair to confine their distribution, sales, and solicitation activities to a fixed location, is a permissible restriction on the place and manner of communicating the views of the Krishna religion. Pp. 647–655.

(a) Rule 6.05 is not based upon the content or subject matter of speech, since it applies evenhandedly to all persons or organizations,

whether commercial or charitable, who wish to distribute and sell written materials or to solicit funds. Nor is the Rule—which involves a method of allocating space on a first-come, first-served basis—open to the kind of arbitrary application that is inherently inconsistent with a valid time, place, and manner regulation as having the potential for becoming a means of suppressing a particular point of view. Pp. 648–649.

(b) The State's interest in maintaining the orderly movement of the crowd at the fair is sufficient to satisfy the requirement that a time, place, or manner restriction must serve a significant governmental interest. The significance of that interest must be assessed in light of the characteristic nature and function of the particular forum involved. Because the fairgrounds comprise a relatively small area where an enormous variety of goods, services, entertainment, and other matters of interest are exhibited to large crowds on a temporary basis, the State's interest in the orderly movement and control of such an assembly is a substantial consideration. Pp. 649–651.

(c) The justification for Rule 6.05 cannot be measured solely on the basis of the disorder that would result from granting members of ISKCON an exemption from the Rule. Inclusion of peripatetic solicitation as part of a church ritual does not entitle church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process. And if Rule 6.05 is an invalid restriction on ISKCON's activities, it is no more valid with respect to other social, political, or charitable organizations seeking to distribute information, sell wares, or solicit funds at the fair. Pp. 651–654.

(d) Similarly, Rule 6.05 cannot be viewed as an unnecessary regulation on the ground that the State could avoid the threat to its interest posed by ISKCON by less restrictive means, such as penalizing disorder, limiting the number of solicitors, or imposing more narrowly drawn restrictions on the location and movement of ISKCON's representatives. Since the inquiry must involve all other organizations that would be entitled to distribute, sell, or solicit if the booth rule may not be enforced with respect to ISKCON, it is improbable that such alternative means would deal adequately with the problems posed by the large number of distributors and solicitors that would be present on the fairgrounds. P. 654.

(e) Alternative forums for the expression of respondents' protected speech exist despite the effects of Rule 6.05. The Rule does not prevent ISKCON from practicing Sankirtan anywhere outside the fairgrounds, nor does it exclude ISKCON from the fairgrounds. Its members may mingle with the crowd and orally propagate their views, and ISKCON

may also arrange for a booth and distribute and sell literature and solicit funds from that location on the fairgrounds. Pp. 654–655.

299 N. W. 2d 79, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 656. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, *post*, p. 663.

Kent G. Harbison, Special Assistant Attorney General of Minnesota, argued the cause for petitioners. With him on the briefs were *Warren Spannaus*, Attorney General, and *William P. Marshall*, Special Assistant Attorney General.

Laurence H. Tribe argued the cause for respondents. With him on the brief were *Barry A. Fisher* and *David Grosz*.*

JUSTICE WHITE delivered the opinion of the Court.

The question presented for review is whether a State, consistent with the First and Fourteenth Amendments, may require a religious organization desiring to distribute and sell religious literature and to solicit donations at a state fair to conduct those activities only at an assigned location within the fairgrounds even though application of the rule limits the religious practices of the organization.

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*Briefs of *amici curiae* urging reversal were filed by *Robert Abrams*, Attorney General, *Shirley Adelson Siegel*, Solicitor General, and *Thomas J. Maroney* and *George M. Levy*, Assistant Attorneys General, for the State of New York; by *William J. Brown*, Attorney General, and *Gary Elson Brown*, Special Assistant Attorney General, for the State of Ohio; and by *John H. Larson* and *DeWitt W. Clinton* for the County of Los Angeles.

Briefs of *amici curiae* urging affirmance were filed by *J. Albert Woll*, *Marsha Berzon*, and *Laurence Gold* for the American Federation of Labor and Congress of Industrial Organizations; and by *Bruce J. Ennis, Jr.*, and *Charles S. Sims* for the American Civil Liberties Union et al.

Briefs of *amici curiae* were filed by *John Jordan* for the Gujarat Cultural Association, Inc., et al.; and by *Fletcher N. Baldwin, Jr.*, for the India Cultural Society of New Jersey et al.

I

Each year, the Minnesota Agricultural Society (Society), a public corporation organized under the laws of Minnesota, see Minn. Stat. § 37.01 (1980), operates a State Fair on a 125-acre state-owned tract located in St. Paul, Minn.[1] The Fair is conducted for the purpose of "exhibiting . . . the agricultural, stock-breeding, horticultural, mining, mechanical, industrial, and other products and resources of the state, including proper exhibits and expositions of the arts, human skills, and sciences." *Ibid.* The Fair is a major public event and attracts visitors from all over Minnesota as well as from other parts of the country. During the past five years, the average total attendance for the 12-day Fair has been 1,320,000 persons. The average daily attendance on weekdays has been 115,000 persons and on Saturdays and Sundays 160,000.

The Society is authorized to make all "bylaws, ordinances, and rules, not inconsistent with law, which it may deem necessary or proper for the government of the fair grounds . . . ." Minn Stat. § 37.16 (1980). Under this authority, the Society promulgated Minnesota State Fair Rule 6.05 which provides in relevant part that

> "[s]ale or distribution of any merchandise, including printed or written material except under license issued [by] the Society and/or from a duly-licensed location shall be a misdemeanor."

As Rule 6.05 is construed and applied by the Society, "all persons, groups or firms which desire to sell, exhibit or distribute materials during the annual State Fair must do so only from fixed locations on the fairgrounds."[2] Although the Rule does not prevent organizational representatives from walking about the fairgrounds and communicating the orga-

[1] The facts are taken primarily from the parties' stipulation of facts filed with the Minnesota District Court on July 31, 1978, and reprinted in the joint appendix. App. A–30 through A–36.

[2] Stipulation of Fact #16.

nization's views with fair patrons in face-to-face discussions,[3] it does require that any exhibitor conduct its sales, distribution, and fund solicitation operations from a booth rented from the Society. Space in the fairgrounds is rented to all comers in a nondiscriminatory fashion on a first-come, first-served basis with the rental charge based on the size and location of the booth.[4] The Rule applies alike to nonprofit, charitable, and commercial enterprises.[5]

One day prior to the opening of the 1977 Minnesota State Fair, respondents International Society for Krishna Consciousness, Inc. (ISKCON), an international religious society espousing the views of the Krishna religion, and Joseph Beca, head of the Minneapolis ISKCON temple, filed suit against numerous state officials seeking a declaration that Rule 6.05, both on its face and as applied, violated respondents' rights under the First Amendment, and seeking injunctive relief

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[3] Fair officials did not "intend to restrict [respondents] from peaceably walking about the fairgrounds and discussing their political, religious or other views with Fair patrons." Affidavit of Michael Heffron, App. A–28. See also Tr. of Oral Arg. 5–7. The trial court expressly permitted such oral proselytizing, see *infra*, at 646, and that part of the order was not challenged or appealed.

[4] Over 1,400 exhibitors and concessionaires rented booth space during the 1977 and 1978 Fairs, with several hundred potential exhibitors denied rental space solely because of the limited amount of area available. The propriety of the fee is not an issue in the present case. Cf. *Cox* v. *New Hampshire*, 312 U. S. 569, 576–577 (1941).

[5] The following represent some of the charitable, religious, and other noncommercial organizations that rented booth space at the 1978 Minnesota State Fair: Abortion Rights Council of Minnesota, American Association of Retired Persons, American Heart Association, American Party of Minnesota, Christian Business Men's Association, Church of Christ, D. F. L. State Central Committee, Faith Broadcasting Network, Inc., Independent Republicans of Minnesota, Minnesota Foster Parents Association, Twin Cities Baptist Messianic Witness, World Home Bible League, Christian Educational Service, Lutheran Colportage Service, Minnesota Citizens Concerned for Life, Save Our Unwanted Life, Inc., and United States-China Peoples Friendship Association.

prohibiting enforcement of the Rule against ISKCON and its members. Specifically, ISKCON asserted that the Rule would suppress the practice of Sankirtan, one of its religious rituals, which enjoins its members to go into public places to distribute or sell religious literature and to solicit donations for the support of the Krishna religion.[6] The trial court entered temporary orders to govern the conduct of the parties during the 1977 Fair.[7] When that event concluded and after a hearing, the trial court granted the state officials' motion for summary judgment, upholding the constitutionality of Rule 6.05. Relying on the reasoning in *International Society for Krishna Consciousness, Inc.* v. *Evans*, 440 F. Supp. 414 (SD Ohio 1977), the court found that the State's interest "in providing all fair goers and concessionaries with adequate and equal access to each other and in providing a minimum of

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[6] In performing Sankirtan, ISKCON members "often greet members of the public by giving them flowers or small American flags . . . ." Stipulation of Fact #11. For the purpose of this lawsuit, respondents did not assert any right to seek contributions in return for these "greeting gifts," nor did they seek to dance, chant, or engage in any other activities besides the distribution and sale of literature and the solicitation of donations. *Ibid.*

[7] The trial court temporarily restrained the officials from "arresting, participating in the arrest of, excluding from the Fairgrounds, or preventing activities of [respondents], such as, espousing their religious beliefs, proselytizing others to those beliefs, distributing religious literature or soliciting donations for religious purposes in any portion of the Minnesota Fair Grounds generally open to the public during the 1977 Minnesota State Fair." The court enjoined respondents from "selling or inducing others to purchase, religious literature, items or artifacts, except at a space rented for that purpose on the grounds of the Minnesota Agricultural Society in compliance with the applicable regulations of said Society." Respondents took part in the 1977 Fair pursuant to the terms of the court order. The State submitted various affidavits stating that respondents violated the terms of the order by misrepresenting their cause in seeking solicitations, and by making similar fraudulent statements. These charges are disputed by respondents.

congestion on the fairgrounds" was sufficient to sustain Rule 6.05's limitations as applied to respondents.[8] The court, however, provided that respondents were free to "[r]oam throughout those areas of the fairgrounds generally open to the public for the purpose of discussing with others their religious beliefs."

On appeal, the Minnesota Supreme Court reversed, holding that Rule 6.05, as applied to respondents, unconstitutionally restricted the Krishnas' religious practice of Sankirtan. 299 N. W. 2d 79 (1980). The court rejected the Society's proffered justifications for the Rule as inadequate to warrant the restriction. Furthermore, the application of Rule 6.05 to ISKCON was not essential to the furtherance of the State's interests in that those interests could be served by means less restrictive of respondents' First Amendment rights. We granted the state officials' petition for writ of certiorari in light of the important constitutional issues presented and the conflicting results reached in similar cases in various lower courts.[9] 449 U. S. 1109.

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[8] Given the great number of exhibitors at the State Fair, the trial court was of the view that "[s]ome form of time, place and manner restriction is clearly required if the free speech rights of each of these exhibitors are to be protected." Accordingly, the court ordered that respondents be prohibited from distributing materials such as books, flowers, flags, incense, or artifacts and from engaging in sales or solicitation for monetary donations throughout the fairgrounds except from a booth rented from the Society.

[9] Compare *International Society for Krishna Consciousness, Inc.* v. *Barber*, 506 F. Supp. 147 (NDNY 1980), rev'd, 650 F. 2d 430 (CA2 1981) (invalidating "booth" rule); *Edwards* v. *Maryland State Fair and Agricultural Society, Inc.*, 628 F. 2d 282 (CA4 1980) (same); *International Society for Krishna Consciousness, Inc.* v. *Bowen*, 600 F. 2d 667 (CA7) (same), cert. denied, 444 U. S. 963 (1979); *International Society for Krishna Consciousness, Inc.* v. *Colorado State Fair and Industrial Exposition Comm'n*, 199 Colo. 265, 610 P. 2d 486 (1980) (same), with *Hynes* v. *Metropolitan Government of Nashville*, 478 F. Supp. 9 (MD Tenn. 1979) (upholding "booth" rule); *International Society for Krishna Consciousness, Inc.* v. *Evans*, 440 F. Supp. 414 (SD Ohio 1977) (same). Related issues have been raised concerning religious groups' access to other types of public

II

The State does not dispute that the oral and written dissemination of the Krishnas' religious views and doctrines is protected by the First Amendment. See *Schneider* v. *State*, 308 U. S. 147, 160, 162–164 (1939); *Lovell* v. *City of Griffin*, 303 U. S. 444, 452 (1938). Nor does it claim that this protection is lost because the written materials sought to be distributed are sold rather than given away or because contributions or gifts are solicited in the course of propagating the faith. Our cases indicate as much. *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111 (1943); *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 632 (1980). See *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940).

It is also common ground, however, that the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. *Adderley* v. *Florida*, 385 U. S. 39, 47–48 (1966); *Poulos* v. *New Hampshire*, 345 U. S. 395, 405 (1953); see *Cox* v. *Louisiana*, 379 U. S. 536, 554 (1965). As the Minnesota Supreme Court recognized, the activities of ISKCON, like those of others protected by the First Amendment, are subject to reasonable time, place, and manner restrictions. *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972); *Adderley* v. *Florida*, *supra*; *Kovacs* v. *Cooper*, 336 U. S. 77 (1949); *Cox* v. *New Hampshire*, 312 U. S. 569 (1941).[10] "We have often ap-

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facilities. See *International Society for Krishna Consciousness of Atlanta* v. *Eaves*, 601 F. 2d 809 (CA5 1979) (airports); *International Society for Krishna Consciousness, Inc.* v. *Rochford*, 585 F. 2d 263 (CA7 1978) (same); *International Society for Krishna Consciousness, Inc.* v. *McAvey*, 450 F. Supp. 1265 (SDNY 1978) (World Trade Center); *International Society for Krishna Consciousness, Inc.* v. *Hays*, 438 F. Supp. 1077 (SD Fla. 1977) (highway rest stops); *United States* v. *Boesewetter*, 463 F. Supp. 370 (DC 1978) (performing arts center).

[10] In *Cox* v. *New Hampshire*, a religious group challenged a local ordinance forbidding street parades without a license. The Court held the requirement constitutional as a reasonable time, place, and manner regula-

proved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information." *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 771 (1976); see also *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S. 530, 535 (1980). The issue here, as it was below, is whether Rule 6.05 is a permissible restriction on the place and manner of communicating the views of the Krishna religion, more specifically, whether the Society may require the members of ISKCON who desire to practice Sankirtan at the State Fair to confine their distribution, sales, and solicitation activities to a fixed location.

A major criterion for a valid time, place, and manner restriction is that the restriction "may not be based upon either the content or subject matter of speech." *Consolidated Edison Co.* v. *Public Service Comm'n, supra*, at 536.[11] Rule 6.05

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tion: "Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection." 312 U. S., at 574. *Kovacs* v. *Cooper* upheld as applied to a sound truck a content-neutral and nondiscriminatory local ordinance against the emission of loud and raucous noises on the public streets. In *Adderley* v. *Florida*, no constitutional violation was discerned in applying a local trespass ordinance to persons demonstrating on the grounds of a city jail. We rejected the argument "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please" and held that the "State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." 385 U. S., at 47–48. *Grayned* v. *City of Rockford* sustained as a reasonable time, place, and manner regulation a local ordinance forbidding disturbing noises in the vicinity of a building in which a school is in session.

[11] See *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 771 (1976); *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 93–94 (1977); *Police Department of Chicago* v. *Mosley*, 408 U. S.

qualifies in this respect, since, as the Supreme Court of Minnesota observed, the Rule applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds. No person or organization, whether commercial or charitable, is permitted to engage in such activities except from a booth rented for those purposes.[12]

Nor does Rule 6.05 suffer from the more covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority. The method of allocating space is a straightforward first-come, first-served system. The Rule is not open to the kind of arbitrary application that this Court has condemned as inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view. See *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, 150–153 (1969); *Cox* v. *Louisiana*, *supra*, at 555–558; *Staub* v. *City of Baxley*, 355 U. S. 313, 321–325 (1958); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Cantwell* v. *Connecticut*, *supra*, at 304; *Schneider* v. *State*, 308 U. S., at 164; *Hague* v. *CIO*, 307 U. S. 496, 516 (1939).

A valid time, place, and manner regulation must also "serve a significant governmental interest." *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, *supra*, at 771. See *Grayned* v. *City of Rockford*, *supra*, at 108. Here, the principal justification asserted by the State in support of Rule 6.05 is the need to maintain the orderly movement of

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92 (1972); *Papish* v. *University of Missouri Curators*, 410 U. S. 667, 670 (1973).

[12] Respondents do argue that because the Rule requires ISKCON to await expressions of interest from fair patrons before it may distribute, sell, or solicit funds, the regulation is not content-neutral in that it prefers listener-initiated exchanges to those originating with the speaker. The argument is interesting but has little force. This aspect of the Rule is inherent in the determination to confine exhibitors to fixed locations, it applies to all exhibitors alike, and it does not invalidate the Rule as a reasonable time, place, and manner regulation.

the crowd given the large number of exhibitors and persons attending the Fair.[13]

The fairgrounds comprise a relatively small area of 125 acres, the bulk of which is covered by permanent buildings, temporary structures, parking lots, and connecting thoroughfares. There were some 1,400 exhibitors and concessionaries renting space for the 1977 and 1978 Fairs, chiefly in permanent and temporary buildings. The Fair is designed to exhibit to the public an enormous variety of goods, services, entertainment, and other matters of interest. This is accomplished by confining individual exhibitors to fixed locations, with the public moving to and among the booths or other attractions, using streets and open spaces provided for that purpose. Because the Fair attracts large crowds, see *supra*, at 643, it is apparent that the State's interest in the orderly movement and control of such an assembly of persons is a substantial consideration.

As a general matter, it is clear that a State's interest in protecting the "safety and convenience" of persons using a public forum is a valid governmental objective. See *Grayned* v. *City of Rockford*, 408 U. S., at 115; *Cox* v. *New Hampshire*, 312 U. S., at 574. Furthermore, consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental

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[13] Petitioners assert two other state interests in support of the Rule. First, petitioners claim that the Rule forwards the State's valid interest in protecting its citizens from fraudulent solicitations, deceptive or false speech, and undue annoyance. See *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620 (1980); *Cantwell* v. *Connecticut*, 310 U. S. 296, 306–307 (1940). Petitioners also forward the State's interest in protecting the fairgoers from being harassed or otherwise bothered, on the grounds that they are a captive audience. In light of our holding that the Rule is justified solely in terms of the State's interest in managing the flow of the crowd, we do not reach whether these other two purposes are constitutionally sufficient to support the imposition of the Rule.

interest must be assessed in light of the characteristic nature and function of the particular forum involved. See, *e. g.*, *Grayned* v. *City of Rockford*, *supra*, at 116–117; *Lehman* v. *City of Shaker Heights*, 418 U. S. 298, 302–303 (1974). This observation bears particular import in the present case since respondents make a number of analogies between the fairgrounds and city streets, which have "immemorially been held in trust for the use of the public and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *CIO*, *supra*, at 515. See *Kunz* v. *New York*, 340 U. S. 290, 293 (1951). But it is clear that there are significant differences between a street and the fairgrounds. A street is continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment. The Minnesota Fair, as described above, is a temporary event attracting great numbers of visitors who come to the event for a short period to see and experience the host of exhibits and attractions at the Fair. The flow of the crowd and demands of safety are more pressing in the context of the Fair. As such, any comparisons to public streets are necessarily inexact.

The Minnesota Supreme Court recognized that the State's interest in the orderly movement of a large crowd and in avoiding congestion was substantial and that Rule 6.05 furthered that interest significantly.[14] Nevertheless, the Minnesota Supreme Court declared that the case did not turn on the "importance of the state's undeniable interest in pre-

[14] The court stated that the facts suggested "a situation in which the state's interest in maintaining order is substantial. We have no doubt that Rule 6.05's requirement that all vendors, exhibitors, and concessionaires perform their functions at fixed locations furthers that interest significantly." 299 N. W. 2d, at 83.

venting the widespread disorder that would surely exist if no regulation such as Rule 6.05 were in effect" but upon the significance of the State's interest in avoiding whatever disorder would likely result from granting members of ISKCON an exemption from the Rule. 299 N. W. 2d, at 83. Approaching the case in this way, the court concluded that although some disruption would occur from such an exemption, it was not of sufficient concern to warrant confining the Krishnas to a booth. The court also concluded that, in any event, the Rule was not essential to the furtherance of the State's interest in crowd control, which could adequately be served by less intrusive means.

As we see it, the Minnesota Supreme Court took too narrow a view of the State's interest in avoiding congestion and maintaining the orderly movement of fair patrons on the fairgrounds. The justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON. That organization and its ritual of Sankirtan have no special claim to First Amendment protection as compared to that of other religions who also distribute literature and solicit funds.[15] None of our cases suggest that the inclusion of peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process. Nor for present purposes do religious organizations enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to

[15] Respondents do not defend the limited approach of the Minnesota Supreme Court. They concede that whatever exemption they were entitled to under the First Amendment would apply to other organizations seeking similar rights to take part in certain protected activities in the public areas of the fairgrounds. See Brief for Respondents 8; Tr. of Oral Arg. 25–26.

proselytize. These nonreligious organizations seeking support for their activities are entitled to rights equal to those of religious groups to enter a public forum and spread their views, whether by soliciting funds or by distributing literature.

If Rule 6.05 is an invalid restriction on the activities of ISKCON, it is no more valid with respect to the other social, political, or charitable organizations that have rented booths at the Fair and confined their distribution, sale, and fund solicitation to those locations. Nor would it be valid with respect to other organizations that did not rent booths, either because they were unavailable due to a lack of space or because they chose to avoid the expense involved, but that would in all probability appear in the fairgrounds to distribute, sell, and solicit if they could freely do so. The question would also inevitably arise as to what extent the First Amendment also gives commercial organizations a right to move among the crowd to distribute information about or to sell their wares as respondents claim they may do.

ISKCON desires to proselytize at the fair because it believes it can successfully communicate and raise funds. In its view, this can be done only by intercepting fair patrons as they move about, and if success is achieved, stopping them momentarily or for longer periods as money is given or exchanged for literature. This consequence would be multiplied many times over if Rule 6.05 could not be applied to confine such transactions by ISKCON and others to fixed locations. Indeed, the court below agreed that without Rule 6.05 there would be widespread disorder at the fairgrounds. The court also recognized that some disorder would inevitably result from exempting the Krishnas from the Rule. Obviously, there would be a much larger threat to the State's interest in crowd control if all other religious, nonreligious, and noncommercial organizations could likewise move freely about the fairgrounds distributing and selling literature and soliciting funds at will.

Given these considerations, we hold that the State's interest in confining distribution, selling, and fund solicitation activities to fixed locations is sufficient to satisfy the requirement that a place or manner restriction must serve a substantial state interest. By focusing on the incidental effect of providing an exemption from Rule 6.05 to ISKCON, the Minnesota Supreme Court did not take into account the fact that any such exemption cannot be meaningfully limited to ISKCON, and as applied to similarly situated groups would prevent the State from furthering its important concern with managing the flow of the crowd. In our view, the Society may apply its Rule and confine the type of transactions at issue to designated locations without violating the First Amendment.

For similar reasons, we cannot agree with the Minnesota Supreme Court that Rule 6.05 is an unnecessary regulation because the State could avoid the threat to its interest posed by ISKCON by less restrictive means, such as penalizing disorder or disruption, limiting the number of solicitors, or putting more narrowly drawn restrictions on the location and movement of ISKCON's representatives. As we have indicated, the inquiry must involve not only ISKCON, but also all other organizations that would be entitled to distribute, sell, or solicit if the booth rule may not be enforced with respect to ISKCON. Looked at in this way, it is quite improbable that the alternative means suggested by the Minnesota Supreme Court would deal adequately with the problems posed by the much larger number of distributors and solicitors that would be present on the fairgrounds if the judgment below were affirmed.

For Rule 6.05 to be valid as a place and manner restriction, it must also be sufficiently clear that alternative forums for the expression of respondents' protected speech exist despite the effects of the Rule. Rule 6.05 is not vulnerable on this ground. First, the Rule does not prevent ISKCON from

practicing Sankirtan anywhere outside the fairgrounds. More importantly, the Rule has not been shown to deny access within the forum in question. Here, the Rule does not exclude ISKCON from the fairgrounds, nor does it deny that organization the right to conduct any desired activity at some point within the forum. Its members may mingle with the crowd and orally propagate their views. The organization may also arrange for a booth and distribute and sell literature and solicit funds from that location on the fairgrounds itself. The Minnesota State Fair is a limited public forum in that it exists to provide a means for a great number of exhibitors temporarily to present their products or views, be they commercial, religious, or political, to a large number of people in an efficient fashion. Considering the limited functions of the Fair and the combined area within which it operates, we are unwilling to say that Rule 6.05 does not provide ISKCON and other organizations with an adequate means to sell and solicit on the fairgrounds. The First Amendment protects the right of every citizen to "reach the minds of willing listeners and to do so there must be opportunity to win their attention." *Kovacs* v. *Cooper*, 336 U. S. 77, 87 (1949). Rule 6.05 does not unnecessarily limit that right within the fairgrounds.[16]

[16] Given this understanding of the nature of the Fair, we reject respondents' claim that Rule 6.05 effects a total ban on protected First Amendment activities in the open areas of the fairgrounds. In effect, respondents seek to separate, for constitutional purposes, the open areas of the fairgrounds from that part of the fairgrounds where the booths are located. For the reasons stated in text, we believe respondents' characterization of the Rule is plainly incorrect. The booths are not secreted away in some nonaccessible location, but are located within the area of the fairgrounds where visitors are expected, and indeed encouraged, to pass. Since respondents are permitted to solicit funds and distribute and sell literature from within the fairgrounds, albeit from a fixed location, it is inaccurate to say that Rule 6.05 constitutes a ban on such protected activity in the relevant public forum. Accordingly, the only question is the Rule's validity as a time, place, and manner restriction.

The judgment of the Supreme Court of Minnesota is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, concurring in part and dissenting in part.

As the Court recognizes, the issue in this case is whether Minnesota State Fair Rule 6.05 constitutes a reasonable time, place, and manner restriction on respondents' exercise of protected First Amendment rights. See *Schad* v. *Mount Ephraim, ante,* at 74–76; *Grayned* v. *City of Rockford,* 408 U. S. 104, 115–116 (1972). In deciding this issue, the Court considers, *inter alia,* whether the regulation serves a significant governmental interest and whether that interest can be served by a less intrusive restriction. See *ante,* at 649–650, 654. The Court errs, however, in failing to apply its analysis separately to each of the protected First Amendment activities restricted by Rule 6.05. Thus, the Court fails to recognize that some of the State's restrictions may be reasonable while others may not.

Rule 6.05 restricts three types of protected First Amendment activity: distribution of literature, sale of literature, and solicitation of funds. See *Schaumburg* v. *Citizens for a Better Environment,* 444 U. S. 620, 632, 633 (1980); *Murdock* v. *Pennsylvania,* 319 U. S. 105, 108 (1943); *Jamison* v. *Texas,* 318 U. S. 413, 416 (1943); *Schneider* v. *State,* 308 U. S. 147, 160 (1939); *Lovell* v. *Griffin,* 303 U. S. 444, 452 (1938). No individual or group is permitted to engage in these activities at the Minnesota State Fair except from preassigned, rented booth locations. Violation of this Rule constitutes a misdemeanor, and violators are subject to arrest and expulsion from the fairgrounds.

The State advances three justifications for its booth Rule. The justification relied upon by the Court today is the State's

interest in maintaining the orderly movement of the crowds at the fair. *Ante*, at 649–650. The second justification, relied upon by the dissenting justices below, 299 N. W. 2d 79, 87 (Minn. 1980), is the State's interest in protecting its fairgoers from fraudulent, deceptive, and misleading solicitation practices. The third justification, based on the "captive audience" doctrine, is the State's interest in protecting its fairgoers from annoyance and harassment.

I quite agree with the Court that the State has a significant interest in maintaining crowd control on its fairgrounds. See *Grayned* v. *City of Rockford*, *supra*, at 115–116; *Cox* v. *New Hampshire*, 312 U. S. 569, 574 (1941). I also have no doubt that the State has a significant interest in protecting its fairgoers from fraudulent or deceptive solicitation practices. See *Schaumburg* v. *Citizens for a Better Environment*, *supra*, at 636; *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 771–772 (1976). Indeed, because I believe on this record that this latter interest is substantially furthered by a Rule that restricts sales and solicitation activities to fixed booth locations, where the State will have the greatest opportunity to police and prevent possible deceptive practices, I would hold that Rule 6.05's restriction on those particular forms of First Amendment expression is justified as an antifraud measure. Accordingly, I join the judgment of the Court insofar as it upholds Rule 6.05's restriction on sales and solicitations. However, because I believe that the booth Rule is an overly intrusive means of achieving the State's interest in crowd control, and because I cannot accept the validity of the State's third asserted justification,[1] I dissent from the Court's approval of Rule 6.05's restriction on the distribution of literature.

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[1] Because fairgoers are fully capable of saying "no" to persons seeking their attention and then walking away, they are not members of a captive audience. They have no general right to be free from being approached. See *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 638–639 (1980); *Martin* v. *Struthers*, 319 U. S. 141, 143–144 (1943).

As our cases have long noted, once a governmental regulation is shown to impinge upon basic First Amendment rights, the burden falls on the government to show the validity of its asserted interest and the absence of less intrusive alternatives. See, *e. g., Schneider* v. *State, supra.* The challenged "regulation must be narrowly tailored to further the State's legitimate interest." *Grayned* v. *City of Rockford, supra,* at 116–117. Minnesota's Rule 6.05 does not meet this test.

The Minnesota State Fair is an annual 12-day festival of people and ideas. Located on permanent fairgrounds comprising approximately 125 acres, the fair attracts an average of 115,000 visitors on weekdays and 160,000 on Saturdays and Sundays. Once the fairgoers pay their admission fees, they are permitted to roam the fairgrounds at will, visiting booths, meeting friends, or just milling about. Significantly, each and every fairgoer, whether political candidate, concerned citizen, or member of a religious group, is free to give speeches, engage in face-to-face advocacy, campaign, or proselytize. No restrictions are placed on any fairgoer's right to speak at any time, at any place, or to any person.[2] Thus, if on a given day 5,000 members of ISKCON came to the fair and paid their admission fees, all 5,000 would be permitted to wander throughout the fairgrounds, delivering speeches to

[2] A state fair is truly a marketplace of ideas and a public forum for the communication of ideas and information. As one court has stated, a "fair is almost by definition a congeries of hawkers, vendors of wares and services, and purveyors of ideas, commercial, esthetic, and intellectual." *International Society for Krishna Consciousness* v. *State Fair of Texas,* 461 F. Supp. 719, 721 (ND Tex. 1978). See also *International Society for Krishna Consciousness, Inc.* v. *Barber,* 650 F. 2d 430, 444, n. 21 (CA2 1981). Despite the Court's suggestion to the contrary, *ante,* at 651, a fair is surely a "natural and proper plac[e] for the dissemination of information and opinion." *Schneider* v. *State,* 308 U. S. 147, 163 (1939). In no way could I agree that respondents' desired " 'manner of expression is basically incompatible with the normal activity' " of the fair. See *Schad* v. *Mount Ephraim, ante,* at 75, quoting *Grayned* v. *City of Rockford,* 408 U. S. 104, 116 (1972).

whomever they wanted, about whatever they wanted. Moreover, because this right does not rest on Sankirtan or any other religious principle,[3] it can be exercised by every political candidate, partisan advocate, and common citizen who has paid the price of admission. All share the identical

[3] I am somewhat puzzled by the Court's treatment of the Sankirtan issue. Respondents' complaint, based on 42 U. S. C. § 1983, alleges that Rule 6.05, on its face and as applied, violates both the Free Exercise and the Free Speech Clauses. In their brief and in oral argument, however, respondents emphasize that they do not claim any special treatment because of Sankirtan, but are willing to rest their challenge wholly upon their general right to free speech, which they concede is identical to the right enjoyed by every other religious, political, or charitable group. Tr. of Oral Arg. 26; Brief for Respondents 19–20, 47–48. There is therefore no need for the Court to discuss Sankirtan.

Having chosen to discuss it, however, the Court does so in a manner that is seemingly inconsistent with prior case law. The parties have stipulated that members of ISKCON have a unique "duty to perform a religious ritual known as *Sankirtan*, which consists of going out into public places, to disseminate or sell religious literature and to solicit contributions to support the publishing, religious, and educational functions of Krishna Consciousness." App. A–32. The Court, however, disparages the significance of this ritual, stating without explanation or supporting authority: "[ISKCON] and its ritual of Sankirtan have no special claim to First Amendment protection as compared to that of other religions who also distribute literature and solicit funds. None of our cases suggest that the inclusion of peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process." *Ante*, at 652 (footnote omitted).

Our cases are clear that governmental regulations which interfere with the exercise of specific religious beliefs or principles should be scrutinized with particular care. See, *e. g.*, *Sherbert* v. *Verner*, 374 U. S. 398, 402–403 (1963). As we stated in *Wisconsin* v. *Yoder*, 406 U. S. 205, 220 (1972), "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." I read the Court as accepting these precedents, and merely holding that even if Sankirtan is "conduct protected by the Free Exercise Clause," it is entitled to no greater protection than other forms of expression protected by the First Amendment that are burdened to the same extent by Rule 6.05.

right to move peripatetically and speak freely throughout the fairgrounds.

Because of Rule 6.05, however, as soon as a proselytizing member of ISKCON hands out a free copy of the Bhagavad-Gita to an interested listener, or a political candidate distributes his campaign brochure to a potential voter, he becomes subject to arrest and removal from the fairgrounds. This constitutes a significant restriction on First Amendment rights. By prohibiting distribution of literature outside the booths, the fair officials sharply limit the number of fairgoers to whom the proselytizers and candidates can communicate their messages. Only if a fairgoer affirmatively seeks out such information by approaching a booth does Rule 6.05 fully permit potential communicators to exercise their First Amendment rights.

In support of the crowd control justification,[4] petitioners contend that if fairgoers are permitted to distribute literature, large crowds will gather, blocking traffic lanes and causing safety problems. As counsel for petitioners asserted at oral argument:

> "[I]t seems to me that if you had [distribution] activity going on with not just the Krishnas but 10 or 20 or 30 representatives from perhaps 30 to 60 or 70 groups, that inevitably is going to draw more attention and going to cause or create more or less moving pockets or moving congested crowds . . . . [I]f all of a sudden the crowd becomes aware of the fact that dozens of people are walking around passing out materials and they're going to

[4] Other than the "captive audience" justification, see n. 1, *supra*, the only interest seriously asserted by petitioners in support of the restriction on distribution of literature is the State's interest in crowd control. At oral argument, counsel for petitioners expressly declined to advance an anti-littering objective, Tr. of Oral Arg. 16, and virtually conceded that the antifraud rationale would not apply unless the communicator sought to obtain money from the fairgoers. *Id.*, at 14–16, 17–19. See also Brief for Petitioners 24–29.

inevitably be attracted by that. Whereas, they wouldn't be if people were just talking." Tr. of Oral Arg. 18–19.

See also Brief for Petitioners 31.

But petitioners have failed to provide any support for these assertions. They have made no showing that relaxation of the booth Rule would create additional disorder in a fair that is already characterized by the robust and unrestrained participation of hundreds of thousands of wandering fairgoers. See *International Society for Krishna Consciousness, Inc.* v. *Barber*, 650 F. 2d 430, 444, n. 22 (CA2 1981). If fairgoers can make speeches, engage in face-to-face proselytizing, and buttonhole prospective supporters, they can surely distribute literature to members of their audience without significantly adding to the State's asserted crowd control problem. Cf. *Martin* v. *Struthers*, 319 U. S. 141, 151 (1943) (Murphy, J., concurring) (invalidating ordinance that banned house-to-house distribution of handbills but did not ban house-to-house proselytizing). The record is devoid of any evidence that the 125-acre fairgrounds could not accommodate peripatetic distributors of literature just as easily as it now accommodates peripatetic speechmakers and proselytizers.[5]

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[5] Moreover, petitioners' expressed concerns are significantly undermined by three affidavits contained in the record which indicate that the State itself engages in the seemingly forbidden practice of leafletting. Thus, the affidavit of Thomas Kerr states:

"2. On numerous occasions when I entered the [1977 Minnesota State Fair], *the individual taking tickets would give to me a flier* which stated that fairgoers might be approached by roving solicitors, that the fair neither licensed nor sanctioned them, and that complaints against them could be filed with the fair administration. On several occasions, *I also noted individuals who appeared to be state fair employees handing out similar fliers at information booths and concession areas.* On several occasions, *I also noticed that individuals, who appeared to be state fair employees, would begin to distribute similar fliers to fairgoers in areas where I or my fellow ISKCON members were proselytizing* or distributing literature." App. A–40 (emphasis added).

See also Affidavit of Joseph Beca, *id.*, at A–38; Affidavit of David C. Ewert,

Relying on a general, speculative fear of disorder, the State of Minnesota has placed a significant restriction on respondents' ability to exercise core First Amendment rights. This restriction is not narrowly drawn to advance the State's interests, and for that reason is unconstitutional. "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 508 (1969). If the State had a reasonable concern that distribution in certain parts of the fairgrounds—for example, entrances and exits—would cause disorder, it could have drafted its Rule to prohibit distribution of literature at those points. If the State felt it necessary to limit the number of persons distributing an organization's literature, it could, within reason, have done that as well.[6] It had no right, however, to ban all distribution of literature outside the booths.[7] A State

> "may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those

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id., at A–43. It is hard to believe the State is seriously concerned about the effects of leafletting, when apparently it too engages in such activity at the State Fair.

[6] Respondents recognize that some limitations may constitutionally be imposed upon their right to distribute literature. Stipulation of Fact #23 states:

"ISKCON, while unwilling to confine its religious activities to a booth, has indicated its willingness to submit to the regulation of its members in their circulation throughout the fairgrounds to proselytize, distribute and sell literature, and solicit contributions." *Id.*, at A–36.

In addition, paragraph 11 of respondents' complaint states:

"ISKCON's devotees have tried to allay any fears Defendants might have that their religious activity might be disruptive to normal Fair activities by offering to wear identifying name tags at all times, to limit the number of devotees at the State Fair Grounds, to approach only consenting patrons, to refrain from engaging Fair patrons in conversation near entrances or exits to buildings or exhibits or in areas where there

[*Footnote 7 is on p. 663*]

> interests without unnecessarily interfering with First Amendment freedoms. . . . 'Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone. . . .'" *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S., at 637, quoting *NAACP* v. *Button*, 371 U. S. 415, 438 (1963).

Accord, *Grayned* v. *City of Rockford*, 408 U. S., at 116–117.

Because I believe that the State could have drafted a more narrowly drawn restriction on the right to distribute literature without undermining its interest in maintaining crowd control on the fairgrounds, I would affirm that part of the judgment below that strikes down Rule 6.05 as it applies to distribution of literature.

JUSTICE BLACKMUN, concurring in part and dissenting in part.

For the reasons stated by JUSTICE BRENNAN, I believe that Minnesota State Fair Rule 6.05 is unconstitutional as applied to the distribution of literature.[1] I also agree, however, that the Rule is *constitutional* as applied to the sale of literature and the solicitation of funds. I reach this latter conclusion by a different route than does JUSTICE BRENNAN for I am not persuaded that, under the Court's precedents, the State's interest in protecting fairgoers from fraudulent solicitation

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are lines or queues, and to identify themselves to Fair officials, including police officials." *Id.*, at A–6.

See also Tr. of Oral Arg. 30, 34–35.

[7] As the Minnesota Supreme Court concluded:

"The state's interest can be adequately served by means less restrictive of First Amendment rights. Conduct that tends to create disorder on the fairgrounds may be specifically prohibited." 299 N. W. 2d 79, 84 (1980).

[1] Like JUSTICE BRENNAN, I would not reach the question whether respondents can claim an exemption from the operation of Rule 6.05 because of their adherence to the doctrine of Sankirtan.

or sales practices justifies Rule 6.05's restrictions of those activities.[2]

In *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 636–637 (1980), the Court stressed that a community's interest in preventing fraudulent solicitations must be met by narrowly drawn regulations that do not unnecessarily interfere with First Amendment freedoms. It there held that possibility of fraud in "door-to-door" or "on-street" solicitations could be countered "by measures less intrusive than a direct prohibition on solicitation," such as disclosure provisions and penal laws prohibiting fraudulent misrepresentations. *Id.*, at 637–638. I see no reason why the same considerations are not applicable here. There is nothing in this record to suggest that it is more difficult to police fairgrounds for fraudulent solicitations than it is to police an entire community's streets; just as fraudulent solicitors may "melt into a crowd" at the fair, so also may door-to-door solicitors quickly move on after consummating several transactions in a particular neighborhood. Indeed, since respondents have offered to wear identifying tags, see App. A–6, and since the fairgrounds are an enclosed area, it is at least arguable that it is easier to police the fairgrounds than a community's streets.

Nonetheless, I believe that the State's substantial interest in maintaining crowd control and safety on the fairgrounds does justify Rule 6.05's restriction on solicitation and sales activities not conducted from a booth. As the Court points out, *ante*, at 651, "[t]he flow of the crowd and demands of

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[2] It should be stressed that Rule 6.05 does not prevent respondents from wandering throughout the fairgrounds and directing interested donors or purchasers to their booth. See Brief for Petitioners 35–36. Thus, it is in fact only the exchange of money, rather than the solicitation *per se* of contributions or of purchases, that is limited to a booth. See 299 N. W. 2d 79, 86 (Minn. 1980) (opinion dissenting in part). Accordingly, I use the terms "solicitation" and "sales" to connote only the actual exchange of money, rather than the act of requesting that the fairgoer purchase literature or make a contribution at the booth.

safety are more pressing in the context of the Fair" than in the context of a typical street. While I agree with JUSTICE BRENNAN that the State's interest in order does not justify restrictions upon distribution of literature, I think that common-sense differences between literature distribution, on the one hand, and solicitation and sales, on the other, suggest that the latter activities present greater crowd control problems than the former. The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead, the recipient is free to read the message at a later time. For this reason, literature distribution may present even fewer crowd control problems than the oral proselytizing that the State already allows upon the fairgrounds. In contrast, as the dissent in the Minnesota Supreme Court observed, sales and the collection of solicited funds not only require the fairgoer to stop, but also "engender additional confusion . . . because they involve acts of exchanging articles for money, fumbling for and dropping money, making change, etc." 299 N. W. 2d 79, 87 (1980). Rules restricting the exchange of money to booths have been upheld in analogous contexts, see, *e. g., International Society for Krishna Consciousness of Atlanta* v. *Eaves,* 601 F. 2d 809, 828–829 (CA5 1979) (Atlanta airports), and for similar reasons I would uphold Rule 6.05 insofar as it applies to solicitation and sales.

FIRST NATIONAL MAINTENANCE CORP. *v.* NATIONAL LABOR RELATIONS BOARD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 80-544. Argued April 21, 1981—Decided June 22, 1981

Petitioner, a company engaged in the business of providing housekeeping, cleaning, maintenance, and related services for commercial customers, had a contract to do maintenance work for a nursing home. As a result of a dispute with the home over the size of the management fee, petitioner terminated the contract, and petitioner's employees who worked at the nursing home were discharged. While the contract was still in effect, a labor union was certified as the bargaining representative for petitioner's employees at the nursing home. The union, upon learning of petitioner's intention to discharge these employees, requested a delay from petitioner for the purpose of bargaining but petitioner refused to bargain. The union then filed an unfair labor practice charge against petitioner, alleging violation of its duty to bargain in good faith "with respect to wages, hours, and other terms and conditions of employment" under §§ 8 (d) and 8 (a) (5) of the National Labor Relations Act. The National Labor Relations Board upheld the charge and ordered petitioner, if it agreed to resume the nursing home operations, to reinstate the discharged employees or, if agreement was not reached, to offer the employees equivalent jobs at its other operations. The Court of Appeals enforced the Board's order, holding that while no *per se* rule could be formulated to govern an employer's decision to close part of its business, § 8 (d) creates a *presumption* in favor of mandatory bargaining over such a decision, which presumption is rebuttable by showing that the purposes of the NLRA would not be furthered by imposing a duty to bargain.

Held: Although required to bargain about the effects of such a decision, petitioner had no duty to bargain over its decision to terminate the nursing home contract. The facts of *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203, distinguished. Pp. 674–688.

(a) In view of an employer's need for unencumbered decisionmaking in the conduct of its business, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management rela-

tions and the collective-bargaining process, outweighs the burden placed on the conduct of the business. Pp. 674–680.

(b) The harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making that decision. The decision itself is *not* part of § 8 (d)'s "terms and conditions of employment" over which Congress has mandated bargaining. Pp. 680–686.

627 F. 2d 596, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 688.

Sanford E. Pollack argued the cause for petitioner. With him on the briefs was *Perry S. Heidecker.*

Norton J. Come argued the cause for respondent. With him on the brief were *Solicitor General McCree, Elinor Hadley Stillman,* and *Linda Sher.**

JUSTICE BLACKMUN delivered the opinion of the Court.

Must an employer, under its duty to bargain in good faith "with respect to wages, hours, and other terms and conditions of employment," §§ 8 (d) and 8 (a)(5) of the National Labor Relations Act (Act), as amended, 49 Stat. 452, 29 U. S. C. §§ 158 (d) and 158 (a)(5), negotiate with the certified representative of its employees over its decision to close a part of its business? In this case, the National Labor Relations Board (Board) imposed such a duty on petitioner with re-

*Briefs of *amici curiae* urging reversal were filed by *Robert J. Fenlon* for the American Society for Personnel Administration; by *Marvin E. Frankel, Saul G. Kramer,* and *Stephen A. Bokat* for the Chamber of Commerce of the United States; and by *Daniel Popeo* and *Paul D. Kamenar* for the Washington Legal Foundation.

J. Albert Woll, Laurence Gold, George Kaufmann, and *John A. Fillion* filed a brief for the American Federation of Labor and Congress of Industrial Organizations et al. as *amici curiae* urging affirmance.

spect to its decision to terminate a contract with a customer, and the United States Court of Appeals, although differing over the appropriate rationale, enforced its order.

I

Petitioner, First National Maintenance Corporation (FNM), is a New York corporation engaged in the business of providing housekeeping, cleaning, maintenance, and related services for commercial customers in the New York City area. It supplies each of its customers, at the customer's premises, contracted-for labor force and supervision in return for reimbursement of its labor costs (gross salaries, FICA and FUTA taxes, and insurance) and payment of a set fee. It contracts for and hires personnel separately for each customer, and it does not transfer employees between locations.[1]

During the spring of 1977, petitioner was performing maintenance work for the Greenpark Care Center, a nursing home in Brooklyn. Its written agreement dated April 28, 1976, with Greenpark specified that Greenpark "shall furnish all tools, equiptment [*sic*], materials, and supplies," and would pay petitioner weekly "the sum of five hundred dollars plus the gross weekly payroll and fringe benefits." App. in No. 79–4167 (CA2), pp. 43, 44. Its weekly fee, however, had been reduced to $250 effective November 1, 1976. *Id.*, at 46. The contract prohibited Greenpark from hiring any of petitioner's employees during the term of the contract and for 90 days thereafter. *Id.*, at 44. Petitioner employed approximately 35 workers in its Greenpark operation.

Petitioner's business relationship with Greenpark, seem-

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[1] The record does not show the precise dimension of petitioner's business. See 242 N. L. R. B. 462, 464 (1979). One of the owners testified that petitioner at that time had "between two and four" other nursing homes as customers. *Ibid.* The Administrative Law Judge hypothesized, however: "This is a large Company. For all I know, the 35 men at this particular home were only a small part of its total business in the New York area." *Id.*, at 465.

ingly, was not very remunerative or smooth. In March 1977, Greenpark gave petitioner the 30 days' written notice of cancellation specified by the contract, because of "lack of efficiency." *Id.*, at 52. This cancellation did not become effective, for FNM's work continued after the expiration of that 30-day period. Petitioner, however, became aware that it was losing money at Greenpark. On June 30, by telephone, it asked that its weekly fee be restored at the $500 figure and, on July 6, it informed Greenpark in writing that it would discontinue its operations there on August 1 unless the increase were granted.[2] *Id.*, at 47. By telegram on July 25, petitioner gave final notice of termination. *Id.*, at 48.

While FNM was experiencing these difficulties, District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL–CIO (union), was conducting an organization campaign among petitioner's Greenpark employees. On March 31, 1977, at a Board-conducted election, a majority of the employees selected the union as their bargaining agent.[3] On July 12, the union's vice president, Edward Wecker, wrote petitioner, notifying it of the certification and of the union's right to bargain, and stating: "We look forward to meeting with you or your representative for that purpose. Please advise when it will be convenient." *Id.*, at 49. Petitioner neither responded nor sought to consult with the union.

On July 28, petitioner notified its Greenpark employees that they would be discharged three days later. Wecker immediately telephoned petitioner's secretary-treasurer, Leonard Marsh, to request a delay for the purpose of bargaining. Marsh refused the offer to bargain and told Wecker that the termination of the Greenpark operation was purely a matter

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[2] The record does not disclose how the contract's 30-day written notice provision was satisfied. In any event, the parties make no point of any shortage in the notice.

[3] The union was certified on May 11, 1977. App. in No. 79–4167 (CA2), p. 50.

of money, and final, and that the 30 days' notice provision of the Greenpark contract made staying on beyond August 1 prohibitively expensive. *Id.*, at 79–81, 83, 85–86, 94. Wecker discussed the matter with Greenpark's management that same day, but was unable to obtain a waiver of the notice provision. *Id.*, at 91–93, 98–99. Greenpark also was unwilling itself to hire the FNM employees because of the contract's 90-day limitation on hiring. *Id.*, at 100–101, 106–107. With nothing but perfunctory further discussion, petitioner on July 31 discontinued its Greenpark operation and discharged the employees. *Id.*, at 110–116.

The union filed an unfair labor practice charge against petitioner, alleging violations of the Act's §§ 8 (a)(1) and (5). After a hearing held upon the Regional Director's complaint, the Administrative Law Judge made findings in the union's favor. Relying on *Ozark Trailers, Inc.*, 161 N. L. R. B. 561 (1966), he ruled that petitioner had failed to satisfy its duty to bargain concerning both the decision to terminate the Greenpark contract and the effect of that change upon the unit employees.[4] The judge reasoned:

> "That the discharge of a man is a change in his conditions of employment hardly needs comment. In these obvious facts, the law is clear. When an employer's work complement is represented by a union and he wishes to alter the hiring arrangements, be his reason lack of money or a mere desire to become richer, the law is no less clear that he must first talk to the union about it. . . . If Wecker had been given an opportunity to talk, something might have been worked out to transfer these people to other parts of [petitioner's] business. . . . Entirely apart from whether open discussion between the parties—with the Union speaking on behalf of the em-

[4] The Administrative Law Judge rejected petitioner's contention that it had satisfied, by that single phone call to Wecker, its duty to bargain about the termination.

> ployees as was its right—might have persuaded [petitioner] to find a way of continuing this part of its operations, there was always the possibility that Marsh might have persuaded Greenpark to use these same employees to continue doing its maintenance work, either as direct employees or as later hires by a replacement contractor." 242 N. L. R. B. 462, 465 (1979).[5]

The Administrative Law Judge recommended an order requiring petitioner to bargain in good faith with the union about its decision to terminate its Greenpark service operation and its consequent discharge of the employees, as well as the effects of the termination. He recommended, also, that petitioner be ordered to pay the discharged employees backpay from the date of discharge until the parties bargained to agreement, or the bargaining reached an impasse, or the union failed timely to request bargaining, or the union failed to bargain in good faith.

The National Labor Relations Board adopted the Administrative Law Judge's findings without further analysis, and additionally required petitioner, if it agreed to resume its Greenpark operations, to offer the terminated employees reinstatement to their former jobs or substantial equivalents; conversely, if agreement was not reached, petitioner was

[5] The judge further found that petitioner's "regular and usual" method of operation involved "taking on, finishing, or discontinuing this or that particular job," 242 N. L. R. B., at 466, and that "[t]here was no capital involved when it decided to terminate the Greenpark job. The closing of this one spot in no sense altered the nature of its business, nor did it substantially affect its total size." *Ibid.* The Administrative Law Judge therefore found inapplicable the Board's ruling in *Brockway Motor Trucks, Division of Mack Trucks, Inc.*, 230 N. L. R. B. 1002, 1003 (1977), enf. denied, 582 F. 2d 720 (CA3 1978), that an employer's decision to close part of its business is not a mandatory subject of bargaining if it involves such a " 'significant investment or withdrawal of capital' as to 'affect the scope and ultimate direction of an enterprise,' " quoting from *General Motors Corp., GMC Truck & Coach Div.*, 191 N. L. R. B. 951, 952 (1971).

ordered to offer the employees equivalent positions, to be made available by discharge of subsequently hired employees, if necessary, at its other operations. *Id.*, at 463.

The United States Court of Appeals for the Second Circuit, with one judge dissenting in part, enforced the Board's order, although it adopted an analysis different from that espoused by the Board. 627 F. 2d 596 (1980).[6] The Court of Appeals reasoned that no *per se* rule could be formulated to govern an employer's decision to close part of its business. Rather, the court said, § 8 (d) creates a *presumption* in favor of mandatory bargaining over such a decision, a presumption that is rebuttable "by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain," for example, by demonstrating that "bargaining over the decision would be futile," or that the decision was due to "emergency financial circumstances," or that the "custom of the industry, shown by the absence of such an obligation from typical collective bargaining agreements, is not to bargain over such decisions." *Id.*, at 601–602.

The Court of Appeals' decision in this case appears to be at odds with decisions of other Courts of Appeals,[7] some of which

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[6] Because the court adopted different grounds for enforcement of the Board's order, it was error to enforce without a remand to the Board for further examination of the evidence and proper factfinding. *NLRB* v. *Pipefitters*, 429 U. S. 507, 522, n. 9 (1977); *SEC* v. *Chenery Corp.*, 318 U. S. 80, 95 (1943).

[7] The Court of Appeals in this case, for example, agreed, 627 F. 2d, at 601, with the Third Circuit in *Brockway Motor Trucks* v. *NLRB*, 582 F. 2d 720 (1978), that a presumption in favor of bargaining was to be established, but it analyzed differently how that presumption would be rebutted. The Third Circuit had decided that the competing interests of the employer and the employees, under the particular circumstances, must be weighed, and it had remanded the case before it to the Board for factfinding into the circumstances behind the partial closing. See also *Equitable Gas Co.* v. *NLRB*, 637 F. 2d 980 (CA3 1981) (subcontracting); *ABC Trans-National Transport, Inc.* v. *NLRB*, 642 F. 2d 675 (CA3 1981) (partial closing); *NLRB* v. *Royal Plating & Polishing Co.*, 350

decline to require bargaining over any management decision involving "a major commitment of capital investment" or a "basic operational change" in the scope or direction of an enterprise,[8] and some of which indicate that bargaining is not mandated unless a violation of § 8 (a)(3) (a partial closing motivated by antiunion animus) is involved.[9] The Court of Appeals for the Fifth Circuit has imposed a duty to bargain over partial closing decisions. See *NLRB* v. *Winn-Dixie Stores, Inc.*, 361 F. 2d 512, cert. denied, 385 U. S. 935 (1966). The Board itself has not been fully consistent in its rulings applicable to this type of management decision.[10]

F. 2d 191 (CA3 1965) (partial closing). Several courts have agreed with the Second Circuit. See, *e. g.*, *Davis* v. *NLRB*, 617 F. 2d 1264 (CA7 1980) (change of full-service restaurant to self-service cafeteria); *NLRB* v. *Production Molded Plastics, Inc.*, 604 F. 2d 451 (CA6 1979) (plant closing).

[8] See, *e. g.*, *NLRB* v. *International Harvester Co.*, 618 F. 2d 85 (CA9 1980); *NLRB* v. *Adams Dairy, Inc.*, 350 F. 2d 108 (CA8 1965), cert. denied, 382 U. S. 1011 (1966); *NLRB* v. *Transmarine Navigation Corp.*, 380 F. 2d 933 (CA9 1967); *Royal Typewriter Co.* v. *NLRB*, 533 F. 2d 1030 (CA8 1976); *NLRB* v. *Rapid Bindery, Inc.*, 293 F. 2d 170 (CA2 1961); *NLRB* v. *Thompson Transport Co.*, 406 F. 2d 698 (CA10 1969).

[9] See, *e. g.*, *Morrison Cafeterias Consolidated, Inc.* v. *NLRB*, 431 F. 2d 254 (CA8 1970); *NLRB* v. *Drapery Mfg. Co.*, 425 F. 2d 1026 (CA8 1970); *NLRB* v. *William J. Burns International Detective Agency, Inc.*, 346 F. 2d 897 (CA8 1965).

[10] Compare *National Car Rental System, Inc.*, 252 N. L. R. B. 159, 161 (1980) (employer's decision to terminate car leasing operations at one location not a mandatory subject because "'essentially financial and managerial in nature,' involving a 'significant investment or withdrawal of capital, affecting the scope and ultimate direction of an enterprise,'" quoting from *General Motors Corp., GMC Truck & Coach Div.*, 191 N. L. R. B., at 952), and *Summit Tooling Co.*, 195 N. L. R. B. 479, 480 (1972) (decision to close a subsidiary not a mandatory subject because "its practical effect was to take the Respondent out of the business of manufacturing tool and tooling products"), with *Ozark Trailers, Inc.*, 161 N. L. R. B. 561, 567, 568 (1966) (employer's decision to shut down one of multiple plants was a mandatory subject because it was "a decision directly affecting terms and conditions of employment" and "interests of

Because of the importance of the issue and the continuing disagreement between and among the Board and the Courts of Appeals, we granted certiorari. 449 U. S. 1076 (1981).

II

A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937). Central to achievement of this purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management.[11] § 1 of the Act, as amended, 29 U. S. C. § 151. Congress ensured that collective bargaining would go forward by creating the Board and giving it the power to condemn as unfair labor practices certain conduct by unions and employers that it deemed deleterious to the process, including the refusal "to bargain collectively." §§ 3 and 8, 29 U. S. C. §§ 153 and 158.

Although parties are free to bargain about any legal subject, Congress has limited the mandate or duty to bargain to matters of "wages, hours, and other terms and conditions of employment."[12] A unilateral change as to a subject within

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employees are of sufficient importance that their representatives ought to be consulted in matters affecting them"). See also *Kingwood Mining Co.*, 210 N. L. R. B. 844 (1974), aff'd *sub nom. United Mine Workers* v. *NLRB*, 169 U. S. App. D. C. 301, 515 F. 2d 1018 (1975).

[11] "Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S., at 42 (upholding the constitutionality of the Act).

[12] Sections 8 (a)(5) and 8 (b)(3) of the Act make it an unfair labor practice for an employer and union representative, respectively, "to refuse

this category violates the statutory duty to bargain and is subject to the Board's remedial order. *NLRB* v. *Katz*, 369 U. S. 736 (1962). Conversely, both employer and union may bargain to impasse over these matters and use the economic weapons at their disposal to attempt to secure their respective aims. *NLRB* v. *American National Ins. Co.*, 343 U. S. 395 (1952).[13] Congress deliberately left the words "wages, hours, and other terms and conditions of employment" without further definition, for it did not intend to deprive the Board of the power further to define those terms in light of specific industrial practices.[14]

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to bargain collectively." 29 U. S. C. §§ 158 (a)(5) and 158 (b)(3). Section 8 (d), added, as was § 8 (b)(3), to the Act by the amendatory Labor Management Relations Act, 1947, 61 Stat. 136, defines the duty to bargain as

"the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." 29 U. S. C. § 158 (d).

Section 9 (a) further specifies that

"[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." 29 U. S. C. § 159 (a).

[13] A matter that is not a mandatory subject of bargaining, unless it is illegal, may be raised at the bargaining table to be discussed in good faith, and the parties may incorporate it into an enforceable collective-bargaining agreement. Labor and management may not, however, insist on it to the point of impasse. *NLRB* v. *Borg-Warner Corp.*, 356 U. S. 342 (1958).

[14] In enacting the Labor Management Relations Act, 1947, Congress rejected a proposal in the House to limit the subjects of bargaining to

"(i) [w]age rates, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall, seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit; (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacations and leaves of absence; and (v) adminis-

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Nonetheless, in establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed. Despite the deliberate open-endedness of the statutory language, there is an undeniable limit to the subjects about which bargaining must take place:

> "Section 8 (a) of the Act, of course, does not immutably fix a list of subjects for mandatory bargaining. . . . But it does establish a limitation against which proposed topics must be measured. In general terms, the limitation includes only issues that settle an aspect of the relationship between the employer and the employees." *Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 178 (1971).

See also *Ford Motor Co.* v. *NLRB*, 441 U. S. 488 (1979); *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203 (1964); *Teamsters* v. *Oliver*, 358 U. S. 283 (1959).

Some management decisions, such as choice of advertising

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trative and procedural provisions relating to the foregoing subjects." H. R. 3020 § 2 (11), 80th Cong., 1st Sess. (1947).

The adoption, instead, of the general phrase now part of § 8 (d) was clearly meant to preserve future interpretation by the Board. See H. R. Rep. No. 245, 80th Cong., 1st Sess., 71 (1947) (minority report) ("The appropriate scope of collective bargaining cannot be determined by a formula; it will inevitably depend upon the traditions of an industry, the social and political climate at any given time, the needs of employers and employees, and many related factors. What are proper subject matters for collective bargaining should be left in the first instance to employers and trade-unions, and in the second place, to any administrative agency skilled in the field and competent to devote the necessary time to a study of industrial practices and traditions in each industry or area of the country, subject to review by the courts. It cannot and should not be strait-jacketed by legislative enactment"); H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 34–35 (1947). Specific references in the legislative history to plant closings, however, are inconclusive. See 79 Cong. Rec. 7673, 9682 (1935) (comments of Sen. Walsh and Rep. Griswold).

and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship. See *Fibreboard,* 379 U. S., at 223 (STEWART, J., concurring). Other management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively "an aspect of the relationship" between employer and employee. *Chemical Workers,* 404 U. S., at 178. The present case concerns a third type of management decision, one that had a direct impact on employment, since jobs were inexorably eliminated by the termination, but had as its focus only the economic profitability of the contract with Greenpark, a concern under these facts wholly apart from the employment relationship. This decision, involving a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all, "not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment." *Fibreboard,* 379 U. S., at 223 (STEWART, J., concurring). Cf. *Textile Workers* v. *Darlington Co.,* 380 U. S. 263, 268 (1965) ("an employer has the absolute right to terminate his entire business for any reason he pleases"). At the same time, this decision touches on a matter of central and pressing concern to the union and its member employees: the possibility of continued employment and the retention of the employees' very jobs. See *Brockway Motor Trucks* v. *NLRB,* 582 F. 2d 720, 735–736 (CA3 1978); *Ozark Trailers, Inc.,* 161 N. L. R. B. 561, 566–568 (1966).

Petitioner contends it had no duty to bargain about its decision to terminate its operations at Greenpark. This contention requires that we determine whether the decision itself should be considered part of petitioner's retained freedom to manage its affairs unrelated to employment.[15] The aim of

[15] There is no doubt that petitioner was under a duty to bargain about the results or effects of its decision to stop the work at Greenpark, or

labeling a matter a mandatory subject of bargaining, rather than simply permitting, but not requiring, bargaining, is to "promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace," *Fibreboard*, 379 U. S., at 211. The concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole.[16] *Ford Motor Co.*, 441 U. S., at 500–501; *Borg-Warner*, 356 U. S., at 350 (condemning employer's proposal of "ballot" clause as weakening the collective-bargaining process). This will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process. Management must be free from the constraints of the bargaining process[17]

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that it violated that duty. Petitioner consented to enforcement of the Board's order concerning bargaining over the effects of the closing and has reached agreement with the union on severance pay. App. in No. 79–4167 (CA2), pp. 21–22.

[16] "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.' . . . The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S., at 45. Cf. *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 549 (1964) ("The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship").

[17] The employer has no obligation to abandon its intentions or to agree with union proposals. On proper subjects, it must meet with the union, provide information necessary to the union's understanding of the prob-

to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice. Congress did not explicitly state what issues of mutual concern to union and management it intended to exclude from mandatory bargaining.[18] Nonetheless, in view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

The Court in *Fibreboard* implicitly engaged in this analysis with regard to a decision to subcontract for maintenance work previously done by unit employees. Holding the employer's decision a subject of mandatory bargaining, the Court relied not only on the "literal meaning" of the statutory words, but also reasoned:

> "The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant.

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lem, and in good faith consider any proposals the union advances. In concluding to reject a union's position as to a mandatory subject, however, it must face the union's possible use of strike power. See generally Fleming, The Obligation to Bargain in Good Faith, 47 Va. L. Rev. 988 (1961).

[18] The subjects over which mandatory bargaining has been required have changed over time. Employers and unions have been required to bargain over such diverse topics as profit-sharing plans, *Winn-Dixie Stores, Inc.* v. *NLRB*, 567 F. 2d 1343 (CA5), cert. denied, 439 U. S. 985 (1978); layoffs and recalls, see *Awrey Bakeries, Inc.* v. *NLRB*, 548 F. 2d 138 (CA6 1976); contractual clauses concerning race discrimination, see *Wichita Eagle & Beacon Publishing Co.*, 222 N. L. R. B. 742 (1976); and "most favored nation" clauses, *Dolly Madison Industries, Inc.*, 182 N. L. R. B. 1037 (1970). See also *Borg-Warner*, 356 U. S., at 353 (Harlan, J., concurring in part and dissenting in part).

> No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business." 379 U. S., at 213.

The Court also emphasized that a desire to reduce labor costs, which it considered a matter "peculiarly suitable for resolution within the collective bargaining framework," *id.*, at 214, was at the base of the employer's decision to subcontract:

> "It was induced to contract out the work by assurances from independent contractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments. These have long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework, and industrial experience demonstrates that collective negotiation has been highly successful in achieving peaceful accommodation of the conflicting interests." *Id.*, at 213–214.

The prevalence of bargaining over "contracting out" as a matter of industrial practice generally was taken as further proof of the "amenability of such subjects to the collective bargaining process." *Id.*, at 211.

With this approach in mind, we turn to the specific issue at hand: an economically motivated decision to shut down part of a business.

III

A

Both union and management regard control of the decision to shut down an operation with the utmost seriousness. As has been noted, however, the Act is not intended to serve either party's individual interest, but to foster in a neutral

manner a system in which the conflict between these interests may be resolved. It seems particularly important, therefore, to consider whether requiring bargaining over this sort of decision will advance the neutral purposes of the Act.

A union's interest in participating in the decision to close a particular facility or part of an employer's operations springs from its legitimate concern over job security. The Court has observed: "The words of [§ 8 (d)] . . . plainly cover termination of employment which . . . necessarily results" from closing an operation. *Fibreboard,* 379 U. S., at 210. The union's practical purpose in participating, however, will be largely uniform: it will seek to delay or halt the closing. No doubt it will be impelled, in seeking these ends, to offer concessions, information, and alternatives that might be helpful to management or forestall or prevent the termination of jobs.[19] It is unlikely, however, that requiring bargaining over the decision itself, as well as its effects, will augment this flow of information and suggestions. There is no dispute that the union must be given a significant opportunity to bargain about these matters of job security as part of the "effects" bargaining mandated by § 8 (a)(5). See, *e. g., NLRB* v. *Royal Plating & Polishing Co.,* 350 F. 2d 191, 196 (CA3 1965); *NLRB* v. *Adams Dairy, Inc.,* 350 F. 2d 108 (CA8 1965), cert. denied, 382 U. S. 1011 (1966). And, under § 8 (a)(5), bar-

[19] We are aware of past instances where unions have aided employers in saving failing businesses by lending technical assistance, reducing wages and benefits or increasing production, and even loaning part of earned wages to forestall closures. See S. Slichter, J. Healy, & E. Livernash, The Impact of Collective Bargaining on Management 845–851 (1960); C. Golden & H. Rutenberg, The Dynamics of Industrial Democracy 263–291 (1942). See also *United Steel Workers of America, Local No. 1330,* v. *United States Steel Corp.,* 492 F. Supp. 1 (ND Ohio), aff'd in part and vacated in part, 631 F. 2d 1264 (CA6 1980) (union sought to purchase failing plant); 104 LRR 239 (1980) (employee ownership plan instituted to save company); *id.,* at 267–268 (union accepted pay cuts to reduce plant's financial problems). These have come about without the intervention of the Board enforcing a statutory requirement to bargain.

gaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy. A union, by pursuing such bargaining rights, may achieve valuable concessions from an employer engaged in a partial closing. It also may secure in contract negotiations provisions implementing rights to notice, information, and fair bargaining. See BNA, Basic Patterns in Union Contracts 62–64 (9th ed., 1979).

Moreover, the union's legitimate interest in fair dealing is protected by § 8 (a)(3), which prohibits partial closings motivated by antiunion animus, when done to gain an unfair advantage. *Textile Workers* v. *Darlington Co.*, 380 U. S. 263 (1965). Under § 8 (a)(3) the Board may inquire into the motivations behind a partial closing. An employer may not simply shut down part of its business and mask its desire to weaken and circumvent the union by labeling its decision "purely economic."

Thus, although the union has a natural concern that a partial closing decision not be hastily or unnecessarily entered into, it has some control over the effects of the decision and indirectly may ensure that the decision itself is deliberately considered. It also has direct protection against a partial closing decision that is motivated by an intent to harm a union.

Management's interest in whether it should discuss a decision of this kind is much more complex and varies with the particular circumstances. If labor costs are an important factor in a failing operation and the decision to close, management will have an incentive to confer voluntarily with the union to seek concessions that may make continuing the business profitable. Cf. U. S. News & World Report, Feb. 9, 1981, p. 74; BNA, Labor Relations Yearbook–1979, p. 5 (UAW agreement with Chrysler Corp. to make concessions on wages and fringe benefits). At other times, management may have great need for speed, flexibility, and secrecy in

meeting business opportunities and exigencies.[20] It may face significant tax or securities consequences that hinge on confidentiality, the timing of a plant closing, or a reorganization of the corporate structure. The publicity incident to the normal process of bargaining may injure the possibility of a successful transition or increase the economic damage to the business. The employer also may have no feasible alternative to the closing, and even good-faith bargaining over it may both be futile and cause the employer additional loss.[21]

There is an important difference, also, between permitted bargaining and mandated bargaining. Labeling this type of decision mandatory could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose. See Comment, "Partial Terminations"—A Choice Between Bargaining Equality and Economic Efficiency, 14 UCLA L. Rev. 1089, 1103–1105 (1967). In addition, many of the cases before the Board have involved, as this one did, not simply a refusal to bargain over the decision, but a refusal to bargain at all, often coupled with other unfair labor practices. See, *e. g., Electrical Products Div. of Midland-Ross Corp.* v. *NLRB*, 617 F. 2d 977 (CA3 1980), cert. denied, 449 U. S. 871 (1981); *NLRB* v. *Amoco Chemicals Corp.*, 529 F. 2d 427 (CA5 1976); *Royal Typewriter Co.* v. *NLRB*, 533 F. 2d 1030 (CA8 1976); *NLRB*

[20] See *International Assn. of Machinists & Aerospace Workers* v. *Northeast Airlines, Inc.*, 473 F. 2d 549, 556–557 (CA1), cert. denied, 409 U. S. 845 (1972); *Raskin Packing Co.*, 246 N. L. R. B. No. 15 (1979); *M&M Transportation Co.*, 239 N. L. R. B. 73 (1978); Goetz, The Duty to Bargain About Changes in Operations, 1964 Duke L. J. 1, 9–10. Cf. *Detroit Edison Co.* v. *NLRB*, 440 U. S. 301, 316 (1979) (noting the "danger of inadvertent leaks" in giving union confidential information).

[21] See *ABC Trans-National Transport, Inc.* v. *NLRB*, 642 F. 2d 675 (CA3 1981); Loomis & Herman, Management's Reserved Rights and the NLRB—An Employer's View, 19 Lab. L. J. 695 (1968); Comment, "Partial Terminations"—A Choice Between Bargaining Equality and Economic Efficiency, 14 UCLA L. Rev. 1089 (1967).

v. *American Mfg. Co.*, 351 F. 2d 74 (CA5 1965) (subcontracting); *Smyth Mfg. Co.*, 247 N. L. R. B. 1139 (1980). In these cases, the employer's action gave the Board reason to order remedial relief apart from access to the decisionmaking process. It is not clear that a union would be equally dissatisfied if an employer performed all its bargaining obligations apart from the additional remedy sought here.

While evidence of current labor practice is only an indication of what is feasible through collective bargaining, and not a binding guide, see *Chemical Workers*, 404 U. S., at 176, that evidence supports the apparent imbalance weighing against mandatory bargaining. We note that provisions giving unions a right to participate in the decisionmaking process concerning alteration of the scope of an enterprise appear to be relatively rare. Provisions concerning notice and "effects" bargaining are more prevalent. See II BNA, Collective Bargaining Negotiations and Contracts § 65:201–233 (1981); U. S. Dept. of Labor, Bureau of Labor Statistics, Bull. 2065, Characteristics of Major Collective Bargaining Agreements, Jan. 1, 1978, pp. 96, 100, 101, 102–103 (1980) (charting provisions giving interplant transfer and relocation allowances; advance notice of layoffs, shutdowns, and technological changes; and wage-employment guarantees; no separate tables on decision-bargaining, presumably due to rarity). See also U. S. Dept. of Labor, Bureau of Labor Statistics, Bull. No. 1425–10, Major Collective Bargaining Agreements, Plant Movement, Transfer, and Relocation Allowances (July 1969).

Further, the presumption analysis adopted by the Court of Appeals seems ill-suited to advance harmonious relations between employer and employee. An employer would have difficulty determining beforehand whether it was faced with a situation requiring bargaining or one that involved economic necessity sufficiently compelling to obviate the duty to bargain. If it should decide to risk not bargaining, it might be faced ultimately with harsh remedies forcing it to pay large amounts of backpay to employees who likely would have been

discharged regardless of bargaining, or even to consider reopening a failing operation. See, *e. g., Electrical Products Div. of Midland-Ross Corp.*, 239 N. L. R. B. 323 (1978), enf'd, 617 F. 2d 977 (CA3 1980), cert. denied, 449 U. S. 871 (1981). Cf. *Lever Brothers Co.* v. *International Chemical Workers Union*, 554 F. 2d 115 (CA4 1976) (enjoining plant closure and transfer to permit negotiations). Also, labor costs may not be a crucial circumstance in a particular economically based partial termination. See, *e. g., NLRB* v. *International Harvester Co.*, 618 F. 2d 85 (CA9 1980) (change in marketing structure); *NLRB* v. *Thompson Transport Co.*, 406 F. 2d 698 (CA10 1969) (loss of major customer). And in those cases, the Board's traditional remedies may well be futile. See *ABC Trans-National Transport, Inc.* v. *NLRB*, 642 F. 2d 675 (CA3 1981) (although employer violated its "duty" to bargain about freight terminal closing, court refused to enforce order to bargain). If the employer intended to try to fulfill a court's direction to bargain, it would have difficulty determining exactly at what stage of its deliberations the duty to bargain would arise and what amount of bargaining would suffice before it could implement its decision. Compare *Burns Ford, Inc.*, 182 N. L. R. B. 753 (1970) (one week's notice of layoffs sufficient), and *Hartmann Luggage Co.*, 145 N. L. R. B. 1572 (1964) (entering into executory subcontracting agreement before notifying union not a violation since contract not yet final), with *Royal Plating & Polishing Co.*, 148 N. L. R. B. 545, 555 (1964), enf. denied, 350 F. 2d 191 (CA3 1965) (two weeks' notice before final closing of plant inadequate). If an employer engaged in some discussion, but did not yield to the union's demands, the Board might conclude that the employer had engaged in "surface bargaining," a violation of its good faith. See *NLRB* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131 (CA1), cert. denied, 346 U. S. 887 (1953). A union, too, would have difficulty determining the limits of its prerogatives, whether and when it could use its economic powers to try to alter an employer's

decision, or whether, in doing so, it would trigger sanctions from the Board. See, *e. g.*, *International Offset Corp.*, 210 N. L. R. B. 854 (1974) (union's failure to realize that shutdown was imminent, in view of successive advertisements, sales of equipment, and layoffs, held a waiver of right to bargain); *Shell Oil Co.*, 149 N. L. R. B. 305 (1964) (union waived its right to bargain by failing to request meetings when employer announced intent to transfer a few days before implementation).

We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision,[22] and we hold that the decision itself is *not* part of § 8 (d)'s "terms and conditions," see n. 12, *supra*, over which Congress has mandated bargaining.[23]

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[22] In this opinion we of course intimate no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts. See, *e. g.*, *International Ladies' Garment Workers Union* v. *NLRB*, 150 U. S. App. D. C. 71, 463 F. 2d 907 (1972) (plant relocation predominantly due to labor costs); *Weltronic Co.* v. *NLRB*, 419 F. 2d 1120 (CA6 1969) (decision to move plant three miles), cert. denied, 398 U. S. 938 (1970); *Dan Dee West Virginia Corp.*, 180 N. L. R. B. 534 (1970) (decision to change method of distribution, under which employee-drivers became independent contractors); *Young Motor Truck Service, Inc.*, 156 N. L. R. B. 661 (1966) (decision to sell major portion of business). See also Schwarz, Plant Relocation or Partial Termination—The Duty to Decision-Bargain, 39 Ford. L. Rev. 81, 100–102 (1970).

[23] Despite the contentions of *amicus* AFL–CIO our decision in *Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330 (1960), does not require that we find bargaining over this partial closing decision mandatory. In that case, a union certified as bargaining agent for certain railroad employees requested that the railroad bargain over its decision to close down certain stations thereby eliminating a number of jobs. When the union threatened to strike over the railroad's refusal to bargain on this issue, the railroad sought an injunction in federal court. Construing

B

In order to illustrate the limits of our holding, we turn again to the specific facts of this case. First, we note that when petitioner decided to terminate its Greenpark contract, it had no intention to replace the discharged employees or to move that operation elsewhere. Petitioner's sole purpose was to reduce its economic loss, and the union made no claim of antiunion animus. In addition, petitioner's dispute with Greenpark was solely over the size of the management fee Greenpark was willing to pay. The union had no control or authority over that fee. The most that the union could

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the scope of bargaining required by § 2, First, of the Railway Labor Act, 45 U. S. C. § 152, First, the Court held that the union's effort to negotiate was not "an unlawful bargaining demand," 362 U. S., at 341, and that the District Court was precluded from enjoining the threatened strike by § 4 of the Norris-LaGuardia Act, 29 U. S. C. § 104, which deprives federal courts of "jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from . . . [c]easing or refusing to perform any work. . . ." Although the Court in part relied on an expansive interpretation of § 2, First, which requires railroads to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions," and § 13 (c) of the Norris-LaGuardia Act, 29 U. S. C. § 113 (c), defining "labor dispute" as "any controversy concerning terms or conditions of employment," its decision also rested on the particular aims of the Railway Labor Act and national transportation policy. See 362 U. S., at 336–338. The mandatory scope of bargaining under the Railway Labor Act and the extent of the prohibition against injunctive relief contained in Norris-LaGuardia are not coextensive with the National Labor Relations Act and the Board's jurisdiction over unfair labor practices. See *Chicago & N. W. R. Co.* v. *Transportation Union*, 402 U. S. 570, 579, n. 11 (1971) ("parallels between the duty to bargain in good faith and the duty to exert every reasonable effort, like all parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes"). Cf. *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970); *Buffalo Forge Co.* v. *Steelworkers*, 428 U. S. 397 (1976).

have offered would have been advice and concessions that Greenpark, the third party upon whom rested the success or failure of the contract, had no duty even to consider. These facts in particular distinguish this case from the subcontracting issue presented in *Fibreboard*. Further, the union was not selected as the bargaining representative or certified until well after petitioner's economic difficulties at Greenpark had begun. We thus are not faced with an employer's abrogation of ongoing negotiations or an existing bargaining agreement. Finally, while petitioner's business enterprise did not involve the investment of large amounts of capital in single locations, we do not believe that the absence of "significant investment or withdrawal of capital," *General Motors Corp., GMC Truck & Coach Div.*, 191 N. L. R. B., at 952, is crucial. The decision to halt work at this specific location represented a significant change in petitioner's operations, a change not unlike opening a new line of business or going out of business entirely.

The judgment of the Court of Appeals, accordingly, is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Section 8 (d) of the National Labor Relations Act, as amended, requires employers and employee representatives "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U. S. C. § 158 (d). The question in this case is whether First National Maintenance Corporation's decision to terminate its Greenpark Care Center operation and to discharge the workers employed in that operation was a decision with respect to "terms and conditions of employment" within the meaning of the Act, thus rendering its failure to negotiate with the union unlawful.

As this Court has noted, the words "terms and conditions of employment" plainly cover termination of employment resulting from a management decision to close an operation. *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203, 210 (1964). As the Court today admits, the decision to close an operation "touches on a matter of central and pressing concern to the union and its member employees." *Ante*, at 677. Moreover, as the Court today further concedes, Congress deliberately left the words "terms and conditions of employment" indefinite, so that the NLRB would be able to give content to those terms in light of changing industrial conditions. *Ante*, at 675, and n. 14. In the exercise of its congressionally delegated authority and accumulated expertise, the Board has determined that an employer's decision to close part of its operations affects the "terms and conditions of employment" within the meaning of the Act, and is thus a mandatory subject for collective bargaining. *Ozark Trailers, Inc.*, 161 N. L. R. B. 561 (1966). Nonetheless, the Court today declines to defer to the Board's decision on this sensitive question of industrial relations, and on the basis of pure speculation reverses the judgment of the Board and of the Court of Appeals. I respectfully dissent.

The Court bases its decision on a balancing test. It states that "bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." *Ante*, at 679. I cannot agree with this test, because it takes into account only the interests of *management;* it fails to consider the legitimate employment interests of the workers and their union. Cf. *Brockway Motor Trucks* v. *NLRB*, 582 F. 2d 720, 734–740 (CA3 1978) (balancing of interests of workers in retaining their jobs against interests of employers in maintaining unhindered control over corporate direction). This one-sided approach hardly serves "to foster in a neutral man-

ner" a system for resolution of these serious, two-sided controversies. See *ante*, at 680–681.

Even if the Court's statement of the test were accurate, I could not join in its application, which is based solely on speculation. Apparently, the Court concludes that the benefit to labor-management relations and the collective-bargaining process from negotiation over partial closings is minimal, but it provides no evidence to that effect. The Court acknowledges that the union might be able to offer concessions, information, and alternatives that might obviate or forestall the closing, but it then asserts that "[i]t is unlikely, however, that requiring bargaining over the decision . . . will augment this flow of information and suggestions." *Ante*, at 681. Recent experience, however, suggests the contrary. Most conspicuous, perhaps, were the negotiations between Chrysler Corporation and the United Auto Workers, which led to significant adjustments in compensation and benefits, contributing to Chrysler's ability to remain afloat. See Wall Street Journal, Oct. 26, 1979, p. 3, col. 1. Even where labor costs are not the direct cause of a company's financial difficulties, employee concessions can often enable the company to continue in operation—if the employees have the opportunity to offer such concessions.*

The Court further presumes that management's need for "speed, flexibility, and secrecy" in making partial closing decisions would be frustrated by a requirement to bargain. *Ante*, at 682–683. In some cases the Court might be correct. In others, however, the decision will be made openly and de-

*Indeed, in this case, the Court of Appeals found: "On the record, . . . there is sufficient reason to believe that, given the opportunity, the union might have made concessions, by accepting reduction in wages or benefits (take-backs) or a reduction in the work force, which would in part or in whole have enabled Greenpark to give FNM an increased management fee. At least, if FNM had bargained over its decision to close, that possibility would have been tested, and management would still have been free to close the Greenpark operation if bargaining did not produce a solution." 627 F. 2d 596, 602 (CA2 1980).

liberately, and considerations of "speed, flexibility, and secrecy" will be inapposite. Indeed, in view of management's admitted duty to bargain over the effects of a closing, see *ante*, at 677–678, n. 15, it is difficult to understand why additional bargaining over the closing itself would necessarily unduly delay or publicize the decision.

I am not in a position to judge whether mandatory bargaining over partial closings *in all cases* is consistent with our national labor policy, and neither is the Court. The primary responsibility to determine the scope of the statutory duty to bargain has been entrusted to the NLRB, which should not be reversed by the courts merely because they might prefer another view of the statute. *Ford Motor Co.* v. *NLRB*, 441 U. S. 488, 495–497 (1979); see *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 236 (1963). I therefore agree with the Court of Appeals that employers presumptively have a duty to bargain over a decision to close an operation, and that this presumption can be rebutted by a showing that bargaining would be futile, that the closing was due to emergency financial circumstances, or that, for some other reason, bargaining would not further the purposes of the National Labor Relations Act. 627 F. 2d 596, 601 (CA2 1980). I believe that this approach is amply supported by recent decisions of the Board. *E. g., Brooks-Scanlon, Inc.*, 246 N. L. R. B. 476, 102 LRRM 1606 (1979); *Raskin Packing Co.*, 246 N. L. R. B. 78, 102 LRRM 1489 (1979); *M. & M. Transportation Co.*, 239 N. L. R. B. 73 (1978). With respect to the individual facts of this case, however, I would vacate the judgment of the Court of Appeals, and remand to the Board for further examination of the evidence. See *SEC* v. *Chenery Corp.*, 318 U. S. 80, 94–95 (1943).

MICHIGAN *v.* SUMMERS

CERTIORARI TO THE SUPREME COURT OF MICHIGAN

No. 79–1794. Argued February 25, 1981—Decided June 22, 1981

When police officers executing a warrant to search a house for narcotics encountered respondent descending the front steps, they requested his assistance in gaining entry and detained him while they searched the premises. After finding narcotics and ascertaining that respondent owned the house, the police arrested him, searched his person, and found heroin in his coat pocket. Respondent, who was charged with possession of the heroin found on his person, moved to suppress the heroin as the product of an illegal search in violation of the Fourth Amendment. The trial judge granted the motion and quashed the information, and both the Michigan Court of Appeals and the Michigan Supreme Court affirmed.

Held: The initial detention of respondent, which constituted a "seizure" and was assumed to be unsupported by probable cause, did not violate his constitutional right to be secure against an unreasonable seizure of his person. For Fourth Amendment purposes, a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted. Because it was lawful to require respondent to re-enter and to remain in the house until evidence establishing probable cause to arrest him was found, his arrest and the search incident thereto were constitutionally permissible. Pp. 694–705.

407 Mich. 432, 286 N. W. 2d 226, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 706.

Timothy A. Baughman argued the cause for petitioner. With him on the brief was *William L. Cahalan.*

Gerald M. Lorence argued the cause and filed a brief for respondent.

Elliott Schulder argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were

Solicitor General McCree, Assistant Attorney General Heymann, and *Deputy Solicitor General Frey.*

Bruce J. Ennis, Jr., argued the cause for the American Civil Liberties Union as *amicus curiae* urging affirmance. With him on the brief was *Lawrence Herman.**

JUSTICE STEVENS delivered the opinion of the Court.

As Detroit police officers were about to execute a warrant to search a house for narcotics, they encountered respondent descending the front steps. They requested his assistance in gaining entry and detained him while they searched the premises. After finding narcotics in the basement and ascertaining that respondent owned the house, the police arrested him, searched his person, and found in his coat pocket an envelope containing 8.5 grams of heroin.[1]

**David Crump* and *Michael C. Kuhn* filed a brief for John B. Holmes, Jr., et al. as *amici curiae* urging reversal.

[1] The execution of the warrant is described in greater detail in Justice Moody's opinion for the Michigan Supreme Court:

"Upon arriving at the named address, Officer Roger Lehman saw the defendant go out the front door of the house and proceed across the porch and down the steps. When defendant was asked to open the door he replied that he could not because he left his keys inside, but he could ring someone over the intercom. Dwight Calhoun came to the door, but did not admit the police officers. As a result, the officers obtained entrance to the premises by forcing open the front door. Once admittance had been gained Officer Lehman instructed Officer Conant, previously stationed along the side of the house, to bring the defendant, still on the porch, into the house.

"After the eight occupants of the house were detained, a search of the premises revealed two plastic bags of suspected narcotics under the bar in the basement. After finding the suspected narcotics in the basement and upon determining that the defendant was the owner of the house, Officer Conant formally arrested the defendant for violation of the Controlled Substances Act of 1971. MCL 335.341 (4)(a); MSA 18.1070 (41)(4)(a). A custodial search conducted by Officer Conant revealed a plastic bag containing suspected heroin in the defendant's jacket pocket. It is this heroin, discovered on the person of the defendant, that forms the basis

Respondent was charged with possession of the heroin found on his person. He moved to suppress the heroin as the product of an illegal search in violation of the Fourth Amendment,[2] and the trial judge granted the motion and quashed the information. That order was affirmed by a divided panel of the Michigan Court of Appeals, 68 Mich. App. 571, 243 N. W. 2d 689, and by the Michigan Supreme Court over the dissent of three of its justices. 407 Mich. 432, 286 N. W. 2d 226. We granted the State's petition for certiorari, 449 U. S. 898, and now reverse.

I

The dispositive question in this case is whether the initial detention of respondent violated his constitutional right to be secure against an unreasonable seizure of his person. The State attempts to justify the eventual search of respondent's person by arguing that the authority to search premises granted by the warrant implicitly included the authority to search persons on those premises, just as that authority included an authorization to search furniture and containers in which the particular things described might be concealed. But as the Michigan Court of Appeals correctly noted, even if otherwise acceptable, this argument could not justify the initial detention of respondent outside the premises described in the warrant. See 68 Mich. App., at 578–580, 243 N. W.

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of the instant possession charge." 407 Mich. 432, 441, 286 N. W. 2d 226, 226–227.

[2] The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment requires the several States to secure these rights. See *Payton* v. *New York*, 445 U. S. 573, 576; *Dunaway* v. *New York*, 442 U. S. 200, 207.

2d, at 692–693. If that detention was permissible, there is no need to reach the question whether a search warrant for premises includes the right to search persons found there, because when the police searched respondent, they had probable cause to arrest him and had done so.[3] Our appraisal of the validity of the search of respondent's person therefore depends upon a determination whether the officers had the authority to require him to re-enter the house and to remain there while they conducted their search.[4]

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[3] Because there were several other occupants of the house, under Michigan law the evidence that narcotics had been found in the basement of respondent's house would apparently be insufficient to support a conviction. See *People* v. *Davenport*, 39 Mich. App. 252, 197 N. W. 2d 521 (1972). The Michigan Court of Appeals relied on *Davenport* to conclude that the officers did not have probable cause to arrest or search respondent even though he was the owner of a house in which contraband was found. 68 Mich. App., at 580–582, 243 N. W. 2d, at 692–693. Judge Bashara, dissenting in the Court of Appeals, *id.*, at 585, 243 N. W. 2d, at 695, and the three dissenting justices of the Michigan Supreme Court, 407 Mich., at 450, 463–464, 286 N. W. 2d, at 231, 237, pointed out that *Davenport*, which concerns the proof necessary to support a conviction, is not dispositive of the question whether the police had probable cause to arrest. See *Brinegar* v. *United States*, 338 U. S. 160, 174–176. Regardless of whether the police had probable cause to arrest respondent under Michigan law, probable cause within the meaning of the Fourth Amendment is not at issue here. Respondent does not challenge the conclusion that the evidence found in his home established probable cause to arrest him. See Brief for Respondent 17.

[4] The "seizure" issue in this case should not be confused with the "search" issue presented in *Ybarra* v. *Illinois*, 444 U. S. 85. In *Ybarra* the police executing a search warrant for a public tavern detained and searched all of the customers who happened to be present. No question concerning the legitimacy of the detention was raised. Rather, the Court concluded that the search of Ybarra was invalid because the police had no reason to believe he had any special connection with the premises, and the police had no other basis for suspecting that he was armed or in possession of contraband. See *id.*, at 90–93. In this case, only the detention is at issue. The police knew respondent lived in the house, and

II

In assessing the validity of respondent's initial detention, we note first that it constituted a "seizure" within the meaning of the Fourth Amendment.[5] The State does not contend otherwise, and the record demonstrates that respondent was not free to leave the premises while the officers were searching his home. It is also clear that respondent was not formally arrested until after the search was completed. The dispute therefore involves only the constitutionality of a pre-arrest "seizure" which we assume was unsupported by probable cause.

In *Dunaway* v. *New York*, 442 U. S. 200, the Court reaffirmed the general rule that an official seizure of the person must be supported by probable cause, even if no formal arrest is made. In that case police officers located a murder suspect at a neighbor's house, took him into custody, and transported him to the police station, where interrogation ultimately produced a confession. Because the suspect was not arrested until after he had confessed, and because he presumably would have been set free if probable cause had not been established during his questioning, the State argued that the pre-arrest detention should not be equated with an arrest and should be upheld as "reasonable" in view of the serious character of the crime and the fact that the police had an articulable basis for suspecting that Dunaway was involved. *Id.*, at 207. The Court firmly rejected the State's argument, noting that "the detention of petitioner was in

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they did not search him until after they had probable cause to arrest and had done so.

[5] "It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry* v. *Ohio*, 392 U. S. 1, 16.

important respects indistinguishable from a traditional arrest." *Id.*, at 212.[6] We stated:

> "Indeed, any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause.
>
> "The central importance of the probable-cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised in this fashion. 'The requirement of probable cause has roots that are deep in our history.' *Henry* v. *United States*, 361 U. S. 98, 100 (1959). Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that 'common rumor or report, suspicion, or even "strong reason to suspect" was not adequate to support a warrant for arrest.' *Id.*, at 101 (footnotes omitted). The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule. See *Brinegar* v. *United States*, [338 U. S., at 175–176]." *Id.*, at 213.

Although we refused in *Dunaway* to find an exception that would swallow the general rule, our opinion recognized that some seizures significantly less intrusive than an arrest have withstood scrutiny under the reasonableness standard embodied in the Fourth Amendment. In these cases the intru-

[6] The Court noted that Dunaway was "taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room." He was not informed that he was free to leave; he would not have been free to leave and would have been physically restrained had he attempted to do so. 442 U. S., at 212.

sion on the citizen's privacy "was so much less severe" than that involved in a traditional arrest that "the opposing interests in crime prevention and detection and in the police officer's safety" could support the seizure as reasonable. *Id.*, at 209.

In the first such case, *Terry* v. *Ohio*, 392 U. S. 1, the Court recognized the narrow authority of police officers who suspect criminal activity to make limited intrusions on an individual's personal security based on less than probable cause. The Court approved a "frisk" for weapons as a justifiable response to an officer's reasonable belief that he was dealing with a possibly armed and dangerous suspect.[7] In the second such case, *Adams* v. *Williams*, 407 U. S. 143, the Court relied on *Terry* to hold that an officer could forcibly stop a suspect to investigate an informant's tip that the suspect was armed and carrying narcotics.[8] And in *United States* v. *Brignoni-Ponce*, 422 U. S. 873, the Court held that the special enforcement problems confronted by roving Border Patrol agents, though not sufficient to justify random stops of vehi-

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[7] In upholding the "frisk" employed by the officer in that case, the Court assumed, without explicitly stating, that the Fourth Amendment does not prohibit forcible stops when the officer has a reasonable suspicion that a crime has been or is being committed. See 392 U. S., at 32–33 (Harlan, J., concurring); *id.*, at 34 (WHITE, J., concurring). In *Adams* v. *Williams*, 407 U. S., at 146, the Court made explicit what was implicit in *Terry*:

"A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."

See also *United States* v. *Brignoni-Ponce*, 422 U. S. 873; *United States* v. *Cortez*, 449 U. S. 411.

[8] The Court noted that the informant's tip was insufficient to justify an arrest or search based on probable cause under *Spinelli* v. *United States*, 393 U. S. 410, and *Aguilar* v. *Texas*, 378 U. S. 108, but the information "carried enough indicia of reliability to justify the officer's forcible stop of Williams." 407 U. S., at 147.

cles near the Mexican border to question their occupants about their citizenship, *id.*, at 882–884,[9] were adequate to support vehicle stops based on the agents' awareness of specific articulable facts indicating that the vehicle contained illegal aliens. The Court reasoned that the difficulty in patrolling the long Mexican border and the interest in controlling the influx of illegal aliens justified the limited intrusion, usually lasting no more than a minute, involved in the stop. *Id.*, at 878–880.[10] See also *United States* v. *Cortez*, 449 U. S. 411.

These cases recognize that some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity. In these cases, as in *Dunaway*, the Court was applying the ultimate standard of reasonableness embodied in the

[9] In several cases, the Court has concluded that the absence of any articulable facts available to the officer rendered a detention unreasonable. In *Delaware* v. *Prouse*, 440 U. S. 648, 663, the Court held that police could not make random stops of vehicles in order to check drivers' licenses and vehicle registrations in the absence of "articulable and reasonable suspicion" that the motorist was unlicensed or the car unregistered. In *Brown* v. *Texas*, 443 U. S. 47, we held that a statute requiring individuals to identify themselves was unconstitutional as applied because the police did not have any reasonable suspicion that the petitioner had committed or was committing a crime. Finally, in *Ybarra* v. *Illinois*, 444 U. S. 85, we held that police executing a search warrant at a tavern could not invoke *Terry* to frisk a patron unless the officers had individualized suspicion that the patron might be armed or dangerous.

[10] The detention approved in *Brignoni-Ponce* did not encompass a search of the vehicle. The Court had held in *Almeida-Sanchez* v. *United States*, 413 U. S. 266, that such a search must be supported by probable cause. In *United States* v. *Martinez-Fuerte*, 428 U. S. 543, the Court held that stops at permanent checkpoints involved even less intrusion to a motorist than the detention by the roving patrol, and thus a stop at such a checkpoint need not even be based on any individualized suspicion.

Fourth Amendment.[11] They are consistent with the general rule that every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause. But they demonstrate that the exception for limited intrusions that may be justified by special law enforcement interests is not confined to the momentary, on-the-street detention accompanied by a frisk for weapons involved in *Terry* and *Adams*.[12] Therefore, in

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[11] In his opinion for the Court in *Terry*, Chief Justice Warren identified "the central inquiry under the Fourth Amendment" as "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." 392 U. S., at 19. Before analyzing the specific stop and frisk involved in that case, he stated:

"The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? Cf. *Carroll* v. *United States*, 267 U. S. 132 (1925); *Beck* v. *Ohio*, 379 U. S. 89, 96–97 (1964)." *Id.*, at 21–22 (footnotes omitted).

[12] JUSTICE WHITE, concurring in *Dunaway*, noted that *Terry* is not "an almost unique exception to a hard-and-fast standard of probable cause." Rather, "the key principle of the Fourth Amendment is reasonableness—the balancing of competing interests." 442 U. S., at 219. If the purpose underlying a *Terry* stop—investigating possible criminal activity—is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry* and *Adams*. As one commentator observed:

"It is clear that there are several investigative techniques which may be utilized effectively in the course of a *Terry*-type stop. The most common is interrogation, which may include both a request for identification and inquiry concerning the suspicious conduct of the person detained. Sometimes the officer will communicate with others, either police or private citizens, in an effort to verify the explanation tendered or to confirm the identification or determine whether a person of that identity is otherwise wanted. Or, the suspect may be detained while it is determined if in fact

order to decide whether this case is controlled by the general rule, it is necessary to examine both the character of the official intrusion and its justification.

III

Of prime importance in assessing the intrusion is the fact that the police had obtained a warrant to search respondent's house for contraband. A neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there. The detention of one of the residents while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself.[13] Indeed, we may safely assume that most citizens—unless they intend flight to avoid arrest—would elect to remain in order to observe the search of their possessions. Furthermore, the type of detention imposed here is not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention.[14]

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an offense has occurred in the area, a process which might involve checking certain premises, locating and examining objects abandoned by the suspect, or talking with other people. If it is known that an offense has occurred in the area, the suspect may be viewed by witnesses to the crime. There is no reason to conclude that any investigative methods of the type just listed are inherently objectionable; they might cast doubt upon the reasonableness of the detention, however, if their use makes the period of detention unduly long or involves moving the suspect to another locale." 3 W. LaFave, Search and Seizure § 9.2, pp. 36–37 (1978).

[13] "As the Court reiterated just a few years ago, the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' *United States* v. *United States District Court*, 407 U. S. 297, 313. And we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort." *Payton* v. *New York*, 445 U. S., at 585–586.

[14] Professor LaFave has noted that the reasonableness of a detention may be determined in part by "whether the police are diligently pur-

Moreover, because the detention in this case was in respondent's own residence, it could add only minimally to the public stigma associated with the search itself and would involve neither the inconvenience nor the indignity associated with a compelled visit to the police station.[15] In sharp contrast to the custodial interrogation in *Dunaway*, the detention of this respondent was "substantially less intrusive" than an arrest. 442 U. S., at 210.[16]

In assessing the justification for the detention of an occupant of premises being searched for contraband pursuant to a valid warrant, both the law enforcement interest and the nature of the "articulable facts" supporting the detention are relevant. Most obvious is the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found. Less obvious, but sometimes of greater importance, is the interest in minimizing the risk of harm to the officers. Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence.[17] The risk of harm to both the

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suing a means of investigation which is likely to resolve the matter one way or another very soon . . . ." 3 W. LaFave, Search and Seizure § 9.2, p. 40 (1978).

[15] Moreover, unlike the seizure in *Dunaway*, which was designed to provide an opportunity for interrogation and did lead to Dunaway's confession, the seizure in this case is not likely to have coercive aspects likely to induce self-incrimination.

[16] We do not view the fact that respondent was leaving his house when the officers arrived to be of constitutional significance. The seizure of respondent on the sidewalk outside was no more intrusive than the detention of those residents of the house whom the police found inside.

[17] The fact that our holding today deals with a case in which the police had a warrant does not, of course, preclude the possibility that comparable police conduct may be justified by exigent circumstances in the absence of a warrant. No such question, however, is presented by this case.

police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation. Cf. 2 W. LaFave, Search and Seizure § 4.9, pp. 150–151 (1978). Finally, the orderly completion of the search may be facilitated if the occupants of the premises are present. Their self-interest may induce them to open locked doors or locked containers to avoid the use of force that is not only damaging to property but may also delay the completion of the task at hand.

It is also appropriate to consider the nature of the articulable and individualized suspicion on which the police base the detention of the occupant of a home subject to a search warrant. We have already noted that the detention represents only an incremental intrusion on personal liberty when the search of a home has been authorized by a valid warrant. The existence of a search warrant, however, also provides an objective justification for the detention. A judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime. Thus a neutral magistrate rather than an officer in the field has made the critical determination that the police should be given a special authorization to thrust themselves into the privacy of a home.[18] The connection of an occupant to that home

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[18] Justice Jackson recognized the significance of this determination in *Johnson* v. *United States*, 333 U. S. 10, 13–14:

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern

gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant.

In *Payton* v. *New York*, 445 U. S. 573, we held that police officers may not enter a private residence to make a routine felony arrest without first obtaining a warrant. In that case we rejected the suggestion that only a search warrant could adequately protect the privacy interests at stake, noting that the distinction between a search warrant and an arrest warrant was far less significant than the interposition of the magistrate's determination of probable cause between the zealous officer and the citizen:

> "It is true that an arrest warrant requirement may afford less protection than a search warrant requirement, but it will suffice to interpose the magistrate's determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Id.*, at 602–603.

That holding is relevant today. If the evidence that a citizen's residence is harboring contraband is sufficient to per-

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to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." (Footnotes omitted.)

suade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home.[19] Thus, for Fourth Amendment purposes, we hold that a warrant to search for contraband [20] founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.[21]

Because it was lawful to require respondent to re-enter and to remain in the house until evidence establishing probable cause to arrest him was found, his arrest and the search incident thereto were constitutionally permissible. The judg-

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[19] In refusing to approve seizures based on less than probable cause, the *Dunaway* Court declined to adopt a "multifactor balancing test of 'reasonable police conduct under the circumstances' to cover all seizures that do not amount to technical arrests." The Court noted:

"[T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the 'often competitive enterprise of ferreting out crime.'" 442 U. S., at 213.

As JUSTICE WHITE noted in his concurrence in *Dunaway*, if police are to have workable rules, the balancing of the competing interests inherent in the *Terry* principle "must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers." 442 U. S., at 219–220. The rule we adopt today does not depend upon such an ad hoc determination, because the officer is not required to evaluate either the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.

[20] We do not decide whether the same result would be justified if the search warrant merely authorized a search for evidence. Cf. *Zurcher* v. *Stanford Daily*, 436 U. S. 547, 560. See also *id.*, at 581 (STEVENS, J., dissenting).

[21] Although special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case, we are persuaded that this routine detention of residents of a house while it was being searched for contraband pursuant to a valid warrant is not such a case.

ment of the Supreme Court of Michigan must therefore be reversed.

It is so ordered.

JUSTICE STEWART, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The Court is correct in stating that "some seizures significantly less intrusive than an arrest have withstood scrutiny under the reasonableness standard embodied in the Fourth Amendment." *Ante*, at 697. But to escalate this statement into some kind of a general rule is to ignore the protections that the Fourth Amendment guarantees to us all. There are only two types of seizures that need not be based on probable cause. The first, represented by the *Terry* line of cases, is a limited stop to question a person and to perform a pat-down for weapons when the police have reason to believe that he is armed and dangerous. *E. g., Terry* v. *Ohio*, 392 U. S. 1, 23–24. The second is a brief stop of vehicles near our international borders to question occupants of the vehicles about their citizenship. *E. g., United States* v. *Brignoni-Ponce*, 422 U. S. 873, 881.

From these two special exceptions to the general prohibition on seizures not based on probable cause, the Court leaps to the very broad idea that courts may approve a wide variety of seizures not based on probable cause, so long as the courts find, after balancing the law enforcement purposes of the police conduct against the severity of their intrusion, that the seizure appears "reasonable." *Ante*, at 700–701, and nn. 11, 12. But those two lines of cases do not represent some sort of exemplary balancing test for Fourth Amendment cases. Rather, they represent two isolated exceptions to the general rule that the Fourth Amendment itself has already performed the constitutional balance between police objectives and personal privacy. The seizure permitted by the Court today, the detention of a person at his home while the police execute a search warrant for contraband inside it, is categorically

different from those two special exceptions to the warrant and probable-cause requirement, and poses a significantly greater threat to the protections guaranteed by the Constitution.

I

The common denominator of the *Terry* cases and the border checkpoint cases is the presence of some governmental interest independent of the ordinary interest in investigating crime and apprehending suspects, an interest important enough to overcome the presumptive constitutional restraints on police conduct. At issue in *Terry* was "more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." *Terry* v. *Ohio*, 392 U. S., at 23. Though the officer in *Terry* was engaged in investigating crime, the governmental purpose that justified the stop and patdown was not the investigation itself, but "the neutralization of danger to the policeman in the investigative circumstance." *Id.*, at 26. Stating its essential holding, the Court said: "When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." *Id.*, at 24.

Similarly, in *Adams* v. *Williams*, 407 U. S. 143, the officer had received an informant's tip, not amounting to probable cause, that Williams was carrying narcotics and a gun. The Court held that the officer acted legally in reaching into the car and intruding on Williams' person to see if Williams indeed was in possession of a lethal weapon. In so holding, the Court made clear that what justified this intrusion on Williams' person was not the possibility of finding contraband

narcotics, but rather the officer's need to protect himself from harm by seizing the suspected gun: "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . . ." *Id.*, at 146; accord, *Pennsylvania* v. *Mimms*, 434 U. S. 106, 110. See *Ybarra* v. *Illinois*, 444 U. S. 85, 93.

In *United States* v. *Brignoni-Ponce*, *supra*, the Court approved a limited stop of vehicles by patrols of immigration officers near the Mexican border, but in doing so it stressed the unique governmental interest in preventing the illegal entry of aliens. The Court held that brief stops and inquiries based on less than probable cause to search or arrest were necessary because the entry of undocumented aliens creates "significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services." 422 U. S., at 878–879. And in *United States* v. *Martinez-Fuerte*, 428 U. S. 543, upholding similarly brief stops and inquiries at permanent checkpoints, the Court relied on the unique difficulty of patrolling a 2,000-mile long and virtually uninhabited border area, a difficulty that would prove insuperable if the Government could stop a vehicle only on the basis of probable cause to believe that that particular vehicle contained illegal entrants. *Id.*, at 552.

It seems clear, therefore, that before a court can uphold a detention on less than probable cause on the ground that it is "reasonable" in the light of the competing interests, the government must demonstrate an important purpose beyond the normal goals of criminal investigation, or must demonstrate an extraordinary obstacle to such investigation.

II

What the Court approves today is justified by no such special governmental interest or law enforcement need. There were only two governmental purposes supporting the deten-

tion of the respondent.[1] One was "the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found." *Ante*, at 702. The other was that "the orderly completion of the search may be facilitated if the occupants of the premises are present." *Ante*, at 703. Unlike the law enforcement objectives that justified the police conduct in *Terry* and the border stop cases, these objectives represented nothing more than the ordinary police interest in discovering evidence of crime and apprehending wrongdoers. And the Fourth and Fourteenth Amendments impose significant restraints upon these traditional police activities, even though the police and the courts may find those restraints unreasonably inconvenient.

If the police, acting without probable cause, can seize a person to make him available for arrest in case probable cause is later developed to arrest him, the requirement of probable cause for arrest has been turned upside down. And if the police may seize a person without probable cause in order to "facilitate" the execution of a warrant that did not authorize his arrest, the fundamental principle that the scope of a search and seizure can be justified only by the scope of the underlying warrant has suffered serious damage. There is no authority in this Court for the principle that the police can engage in searches and seizures without probable cause simply because to do so enhances their ability to conduct

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[1] As the Court acknowledges, *ante*, at 702, the record in this case presents no evidence whatsoever that the police feared any threat to their safety or that of others from the conduct of the respondent, or that they could reasonably have so feared. The Court says that this nevertheless was the "kind of transaction that may give rise to sudden violence . . . ." *Ibid.* But where the police cannot demonstrate, on the basis of specific and articulable facts, a reasonable belief that a person threatens physical harm to them or others, the speculation that other persons in that circumstance might pose such a threat cannot justify a search or seizure. *Ybarra* v. *Illinois*, 444 U. S. 85, 92–93.

investigations which may eventually lead to probable cause. See *Davis* v. *Mississippi*, 394 U. S. 721, 726–727.[2]

Beyond the issue of the governmental interest justifying the detention, I question the Court's view that the detention here is of the limited, unintrusive sort that permits the Court to engage in a "reasonableness" balancing test. As the Court said in *Dunaway* v. *New York*, 442 U. S. 200, 210, *Terry* v. *Ohio* "defined a special category of Fourth Amendment 'seizures' *so substantially less intrusive* than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test." (Emphasis added.) As we then noted in *Dunaway*, the patdown searches in *Terry*, *Adams*, and *Mimms* were declared legal because they were extremely limited in time and in the degree of personal intrusion. 442 U. S., at 210–211. The Court also noted that in the border cases, the stops normally consumed less than a minute and involved no more than brief interrogation. *Id.*, at 211. Thus, in the rare cases in which the Court has permitted an independent balancing of interests, the police intrusion has been extremely narrow. Moreover, the Court has required that the stop and inquiry or search be "reasonably related in scope to the justification for their initiation," *Terry* v. *Ohio*, 392 U. S., at 29; see *United States* v. *Brignoni-Ponce*, 422 U. S., at 881, and, under that requirement, the unusual governmental or law enforcement interests justifying the patdown stops and border stops

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[2] In a perplexing citation, the Court notes our holding in *Payton* v. *New York*, 445 U. S. 573, that an arrest warrant based on probable cause justifies entering a person's home to carry out the arrest, and declares that *Payton* "is relevant today." *Ante*, at 704. But I had thought that the very point of the passage the Court quotes from *Payton*, is that the police would be justified in arresting a person in his own home because they had a warrant for his arrest based upon probable cause to believe that he had violated the criminal law. Since it is the absence of such probable cause that lies at the heart of this case, I fail to understand *Payton*'s "relevance."

have provided a limiting principle ensuring the narrowness of the police action. The detention approved by the Court today, however, is of a very different order.

The explicit holding of the Court is that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Ante*, at 705 (footnotes omitted). Though on superficial reading, this language may suggest a minor intrusion of brief duration, a detention "while a proper search is being conducted" can mean a detention of several hours.[3] The police thereby make the person a prisoner in his own home for a potentially very long period of time.[4] Moreover, because of the ques-

[3] The record does not clearly reveal the length of the search in this case. In *Harris* v. *United States*, 331 U. S. 145, a Federal Bureau of Investigation search of a one-bedroom apartment for burglar tools and a pair of checks consumed five hours. See also *Stanford* v. *Texas*, 379 U. S. 476, 477.

[4] I also question the Court's confident assertions about the inoffensive nature of the detention in this case. First, the Court says the detention was innocuous because it was less intrusive than the search that was mandated by the warrant. *Ante*, at 701. This reasoning is, of course, circular, since the very question of the severity of the detention arises only because it was not based on a warrant or probable cause.

Second, the Court says that the intrusion was not a serious one because a reasonable-minded citizen would in fact want to be present at a search of his house unless he was fleeing to avoid arrest. *Ibid.* But I must infer that the respondent here did not want to be present in his house during the search, else he would not have brought this claim, and the law cannot penalize him for "fleeing arrest" when the police did not have probable cause to arrest him. This second reason amounts to the view that a person cannot assert his rights under the exclusionary rule if he stands to benefit from the exclusion.

Finally, the Court observes that this sort of detention is not likely to be exploited or unduly prolonged by the police, since the officers are more likely to find the information they seek through the search than through the detention. *Ibid.* I confess I do not understand this reason. It seems no more than a restatement of the view that the police may detain the person to have him available for arrest when they com-

tionable nature of the governmental interest asserted by the State and acknowledged by the Court in this case, the requirement that the scope of the intrusion be reasonably related to its justification does not provide a limiting principle for circumscribing the detention. If the purpose of the detention is to help the police make the search, the detention can be as long as the police find it necessary to protract the search.[5]

In *Dunaway*, the Court reaffirmed that the " 'long-prevailing standards' of probable cause embodied 'the best compromise that has been found for accommodating [the] often opposing interests' in 'safeguard[ing] citizens from rash and unreasonable interferences with privacy' and in 'seek[ing] to give fair leeway for enforcing the law in the community's protection.' " 422 U. S., at 208, quoting *Brinegar* v. *United States*, 338 U. S. 160, 176. Because the present case presents no occasion for departing from this principle, I respectfully dissent.

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plete the search, but that view merely begs the question whether the potential duration of the search threatens the person with a lengthy detention.

[5] The Court adverts to this problem only by suggesting that "special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case." *Ante*, at 705, n. 21. But the Court provides no criteria for identifying "special circumstances" or for determining when a detention is "prolonged"; in particular, it fails to tell law enforcement officers whether a detention will always be permissible, however protracted, so long as it does not exceed the length of the search of the house. This ambiguity casts doubt on the Court's assertion, *ante*, at 705, n. 19, that its holding will not require individual police officers to engage in the sort of on-the-scene, ad hoc legal judgments which pose a serious threat to Fourth and Fourteenth Amendment protections. *Dunaway* v. *New York*, 442 U. S. 200, 213.

KISSINGER ET AL. *v.* HALPERIN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-880. Argued December 8, 1980—Decided June 22, 1981

196 U. S. App. D. C. 285, 606 F. 2d 1192, affirmed in part by an equally divided Court, and certiorari dismissed in part.

Solicitor General McCree argued the cause for petitioners. With him on the briefs were *Assistant Attorney General Daniel, Deputy Solicitor General Geller, Mark I. Levy, Barbara L. Herwig,* and *Larry L. Gregg.*

Mark H. Lynch argued the cause for respondents. With him on the brief were *John H. F. Shattuck, Alan B. Morrison,* and *John Cary Sims.**

PER CURIAM.

The judgment with respect to petitioners Kissinger, Nixon, and Mitchell is affirmed by an equally divided Court. With respect to petitioner Haldeman, the writ of certiorari is dismissed as improvidently granted.

JUSTICE REHNQUIST took no part in the consideration or decision of this case.

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*Briefs of *amici curiae* urging affirmance were filed by *Bertram Zweibon, pro se,* for Bertram Zweibon et al.; and by *Leon Friedman, Floyd Abrams, Gerald J. Brown,* and *James C. Goodale* for Hedrick Smith et al.

NEW YORK STATE LIQUOR AUTHORITY *v.* BELLANCA, DBA THE MAIN EVENT, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 80-813. Decided June 22, 1981

Held: A provision of New York's Alcoholic Beverage Control Law prohibiting nude dancing in establishments licensed by the State to sell liquor for on-premises consumption is not unconstitutional as violating the First Amendment on the alleged ground that it prohibits nonobscene topless dancing, but instead is valid as being within the State's broad power under the Twenty-first Amendment to regulate the sale of liquor within its boundaries. Cf. *California* v. *LaRue*, 409 U. S. 109. The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs. Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad power under the Twenty-first Amendment.

Certiorari granted; 50 N. Y. 2d 524, 407 N. E. 2d 460, reversed and remanded.

PER CURIAM.

The question presented in this case is the power of a State to prohibit topless dancing in an establishment licensed by the State to serve liquor. In 1977, the State of New York amended its Alcoholic Beverage Control Law to prohibit nude dancing in establishments licensed by the State to sell liquor for on-premises consumption. N. Y. Alco. Bev. Cont. Law, § 106, subd. 6-a (McKinney Supp. 1980-1981).[1] The stat-

[1] The statute provides:

"No retail licensee for on premises consumption shall suffer or permit any person to appear on licensed premises in such manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, nor shall suffer or permit any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola, or any simulation thereof."

ute does not provide for criminal penalties, but its violation may cause an establishment to lose its liquor license.

Respondents, owners of nightclubs, bars, and restaurants which had for a number of years offered topless dancing, brought a declaratory judgment action in state court, alleging that the statute violates the First Amendment of the United States Constitution insofar as it prohibits all topless dancing in all licensed premises. The New York Supreme Court declared the statute unconstitutional, and the New York Court of Appeals affirmed by a divided vote. 50 N. Y. 2d 524, 407 N. E. 2d 460. It reasoned that topless dancing was a form of protected expression under the First Amendment and that the State had not demonstrated a need for prohibiting "licensees from presenting nonobscene topless dancing performances to willing customers . . . ." *Id.*, at 529, 407 N. E. 2d, at 463. The dissent contended that the statute was well within the State's power, conferred by the Twenty-first Amendment, to regulate the sale of liquor within its boundaries.[2] We agree with the reasoning of the dissent and now reverse the decision of the New York Court of Appeals.

This Court has long recognized that a State has absolute power under the Twenty-first Amendment to prohibit totally the sale of liquor within its boundaries. *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132, 138 (1939). It is equally well established that a State has broad power under the Twenty-first Amendment to regulate the times, places, and circumstances under which liquor may be sold. In *California* v. *LaRue*, 409 U. S. 109 (1972), we upheld the facial constitutionality of a statute prohibiting acts of "gross sexuality," including the display of the genitals and live or filmed performances of sexual acts, in establishments licensed by the State to serve

[2] The Twenty-first Amendment provides in relevant part that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

liquor. Although we recognized that not all of the prohibited acts would be found obscene and were therefore entitled to some measure of First Amendment protection, we reasoned that the statute was within the State's broad power under the Twenty-first Amendment to regulate the sale of liquor.

In *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922 (1975), we considered a First Amendment challenge to a local ordinance which prohibited females from appearing topless not just in bars, but "any public place." Though we concluded that the District Court had not abused its discretion in granting a preliminary injunction against enforcement of the ordinance, that decision does not limit our holding in *LaRue*. First, because *Doran* arose in the context of a preliminary injunction, we limited our standard of review to whether the District Court abused its discretion in concluding that plaintiffs were *likely* to prevail on the merits of their claim, not whether the ordinance actually violated the First Amendment. Thus, the decision may not be considered a "final judicial decision based on the actual merits of the controversy." *University of Texas* v. *Camenisch*, 451 U. S. 390, 396 (1981). Second, the ordinance was far broader than the ordinance involved either in *LaRue* or here, since it proscribed conduct at "any public place," a term that " 'could include the theater, town hall, opera place, as well as a public market place, street or any place of assembly, indoors or outdoors.' " 422 U. S., at 933 (quoting *Salem Inn, Inc.* v. *Frank*, 364 F. Supp. 478, 483 (EDNY 1973)). Here, in contrast, the State has not attempted to ban topless dancing in "any public place": As in *LaRue*, the statute's prohibition applies only to establishments which are licensed by the State to serve liquor. Indeed, we explicitly recognized in *Doran* that a more narrowly drawn statute would survive judicial scrutiny:

> "Although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California* v. *LaRue*, 409

U. S. 109, 118 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. In *LaRue*, however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as part of its liquor license control program." 422 U. S., at 932–933.

Judged by the standards announced in *LaRue* and *Doran*, the statute at issue here is not unconstitutional. What the New York Legislature has done in this case is precisely what this Court in *Doran* has said a State may do. Pursuant to its power to regulate the sale of liquor within its boundaries, it has banned topless dancing in establishments granted a license to serve liquor. The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs.

Respondents nonetheless insist that *LaRue* is distinguishable from this case, since the statute there prohibited acts of "gross sexuality" and was well supported by legislative findings demonstrating a need for the rule. They argue that the statute here is unconstitutional as applied to topless dancing because there is no legislative finding that topless dancing poses anywhere near the problem posed by acts of "gross sexuality." But even if explicit legislative findings were required to uphold the constitutionality of this statute as applied to topless dancing, those findings exist in this case. The purposes of the statute have been set forth in an accompanying legislative memorandum, New York State Legislative Annual 150 (1977).

"Nudity is the kind of conduct that is a proper subject for legislative action as well as regulation by the State Liquor Authority as a phase of liquor licensing. It has long been held that sexual acts and performances

> may constitute disorderly behavior within the meaning of the Alcoholic Beverage Control Law . . . .
>
> "Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior. This legislation prohibiting nudity in public will once and for all, outlaw conduct which is now quite out of hand."

In short, the elected representatives of the State of New York have chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell liquor for on-premises consumption. Given the "added presumption in favor of the validity of the state regulation" conferred by the Twenty-first Amendment, *California* v. *LaRue*, 409 U. S., at 118, we cannot agree with the New York Court of Appeals that the statute violates the United States Constitution. Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, the Twenty-first Amendment makes that a policy judgment for the state legislature, not the courts.

Accordingly, the petition for certiorari is granted, the judgment of the New York Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE MARSHALL concurs in the judgment.

JUSTICE BRENNAN dissents from the summary disposition and would set the case for oral argument.

JUSTICE STEVENS, dissenting.

Although the Court has written several opinions implying that nude or partially nude dancing is a form of expressive

activity protected by the First Amendment, the Court has never directly confronted the question.[1] Today the Court construes the Twenty-first Amendment as a source of power permitting the State to prohibit such presumably protected activities in establishments which serve liquor. The Court relies on *California* v. *LaRue*, 409 U. S. 109, for that construction of the Twenty-first Amendment. The rationale of today's decision however, is not the same as the explanation the Court gave for its holding in that case. The syllogism supporting today's conclusion includes the premise that the State's Twenty-first Amendment power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where activity assumed to be protected by the First Amendment occurs.[2] If that reasoning is sound, then a State may ban any protected activity on such premises, no matter how innocuous or, more importantly, how clearly protected.[3]

In *California* v. *LaRue*, instead of relying on the simplistic reasoning employed by the Court today, the majority analyzed the issue by balancing the State's interests in preventing specifically identified social harms against the minimal interest in protected expression implicated by nude dancing.[4]

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[1] See *Doran* v. *Salem, Inn., Inc.*, 422 U. S. 922; *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 557–558; *California* v. *LaRue*, 409 U. S. 109, 118; *Schad* v. *Mount Ephraim*, *ante*, p. 61.

[2] "The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." *Ante*, at 717.

[3] Rejecting this reasoning, the New York Court of Appeals noted that "it would be most difficult to sustain a law prohibiting political discussions in places where alcohol is sold by the drink, even though the record may show, conclusively, that political discussions in bars often lead to disorderly behavior, assaults and even homicide." 50 N. Y. 2d 524, 531 n. 7, 407 N. E. 2d 460, 464, n. 7.

[4] The Court's opinion in *LaRue* recounted in explicit detail the undesirable consequences—described in evidence adduced at public hearings—

The opinion reflected the view that the degree of protection afforded by the First Amendment is a variable, and that the slight interest in free expression implicated by naked and lewd dancing was plainly outweighed by the State's interest—supported by explicit legislative findings—in maintaining order and decency.[5] The Twenty-first Amendment provided the Court with an "added presumption," 409 U. S., at 118, to tip the scales in the direction of law and order,[6] but the opin-

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resulting from the performance of lewd or naked dancing and entertainment in bars and cocktail lounges. See 409 U. S., at 111–112. After emphasizing the State's interests in eliminating those consequences, the Court turned to a discussion of the First Amendment and stated that "as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases." *Id.*, at 117.

[5] In minimizing the First Amendment interests in nude dancing and recognizing the State's interest in regulating such behavior, the Court stated:

"The substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of communication. . . .

". . . [W]e conceive the State's authority in this area to be somewhat broader than did the District Court. This is not to say that all such conduct and performance are without the protection of the First and Fourteenth Amendments. But we would poorly serve both the interest for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater." *Id.*, at 118.

[6] The Court recognized that the Twenty-first Amendment confers "something more than the normal state authority over public health, welfare, and morals." *Id.*, at 114. In discussing decisions construing the Twenty-first Amendment, however, the Court noted that "[t]hese decisions did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations." *Id.*, at 115.

ion's evaluation of the conflicting interests would surely have led to the same result without that makeweight.[7]

The explicit legislative findings on which the Court heavily relied in *LaRue* have no counterpart in this case. The 1977 amendment to the New York Alcoholic Beverage Control Law left in place the prohibition against nude dancing that had been in effect for some time. Prior to 1977, topless dancing had been permitted subject to regulation that required the performer to dance on a stage that was inaccessible to patrons.[8] The State has not indicated that the New York Legislature was presented with any evidence to the effect that this regulated form of entertainment had produced any undesirable consequences. A memorandum in the New York State Legislative Annual (1977), see *ante*, at 717–718, notes that nudity had "long been held" to constitute disorderly behavior within the meaning of the law as it then existed, but that

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[7] In discussing the Twenty-first Amendment, the Court recognized that the States, "vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power . . . ." *Id.*, at 114. The Court held that the Department of Alcoholic Beverage Control's "conclusion . . . that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution." *Id.*, at 118–119.

[8] The pre-1977 regulation prohibited the licensee from permitting "any female to appear on licensed premises" so as "to expose to view any portion of the breast below the top of the areola" but contained an exception for "any female entertainer performing on a stage or platform which is at least 18 inches above the immediate floor level and which is removed by at least six feet from the nearest patron." See 50 N. Y. 2d, at 526, n. 2, 407 N. E. 2d, at 461–462, n. 2. The 1977 amendment incorporated the general prohibition of topless dancing but did not incorporate the exception. See N. Y. Alco. Bev. Cont. Law § 106, subd. 6–a (McKinney Supp. 1980–1981).

memorandum sheds no light whatever on the decision to prohibit topless dancing as well as nudity.[9] The New York Court of Appeals stated that this law "was not prompted by hearings or any legislative awareness of deficiencies in the prior regulation permitting topless dancing subject to restrictions and the continued supervision of the State Liquor Authority." 50 N. Y. 2d 524, 530, 407 N. E. 2d 460, 464.

I therefore believe that we must assume that the pre-1977 regulation adequately avoided the kind of "gross sexuality" that gave rise to the regulation challenged in *LaRue*. Although the emphasis on the legislative findings in this Court's opinion in *LaRue* may have merely disguised the Court's real holding, the Court is quite wrong today when it implies that the factors that supported the holding in *LaRue* are also present in this case. This case does not involve "gross sexuality" or any legislative explanation for the 1977 change in the law to prohibit topless dancing.

Having said this, I must confess that if the question whether a State may prohibit nude or partially nude dancing

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[9] The New York Court of Appeals recognized the difference between nude and topless dancing and emphasized the limited nature of respondents' challenge:

"In the case now before us the plaintiffs do not claim a right to offer performances of explicit sexual acts, live or filmed, real or simulated. Nor are we concerned with nude dancing. There is no contention that the plaintiffs should have a right to present their dancers entirely unclothed, and thus they do not challenge that portion of the statute which prohibits nudity. Nor do they contest the statute insofar as it would prohibit women other than dancers from appearing barebreasted on their premises. Similarly the plaintiffs do not contest the State's right to place some restriction on topless dancing performances as the Liquor Authority's regulations have done in the past. Finally, of course, the plaintiffs do not claim that they are exempted from the obscenity laws or that topless dancing should always be allowed no matter how, or where performed. The only question before us is whether the statute is constitutional to the extent that it absolutely prohibits liquor licensees from presenting nonobscene topless dancing performances to willing customers under all circumstances." 50 N. Y. 2d, at 529, 407 N. E. 2d, at 463.

in commercial establishments were squarely confronted on its merits, I might well conclude that this is the sort of question that may be resolved by the elected representatives of a community. Sooner or later that issue will be briefed and argued on its own merits.[10] I dissent in this case because I believe the Court should not continue to obscure that issue with irrelevancies such as its mischievous suggestion that the Twenty-first Amendment gives States power to censor free expression in places where liquor is served.[11] Neither the language [12] nor the history of that Amendment provides any

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[10] If topless dancing is entitled to First Amendment protection, it would seem to me that the places where it should most appropriately be conducted are places where alcoholic beverages are served. A holding that a state liquor board may prohibit its licensees from allowing such dancing on their premises may therefore be the practical equivalent of a holding that the activity is not protected by the First Amendment.

[11] In *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324, the Court recognized the effect of the Twenty-first Amendment on the Commerce Clause but included a reminder that is pertinent here:

"Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.*, at 332.

That admonition is even more important in the context presented by the instant case, inasmuch as the drafters of the Twenty-first Amendment clearly intended the Amendment to have some impact on the Commerce Clause. That conclusion, contrary to the Court's reasoning, is totally unsupported with respect to the First Amendment.

[12] In *California Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 106–107, the Court rejected a claim that the Twenty-first Amendment prohibited the application of the Sherman Act to California's system of wine pricing and pointed out that in "determining state powers under the Twenty-first Amendment, the Court has focused primarily on the language of the provision . . . ." The difference between the Court's interpretation of the Twenty-first Amendment and its plain language is quite dramatic. The pertinent section of that Amendment provides:

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

support for that suggestion.[13] Nor does *LaRue* justify it.[14] Without any aid from the Twenty-first Amendment, the

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[13] In *Craig* v. *Boren*, 429 U. S. 190, 206, the Court stated that "[t]his Court's decisions . . . have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause." The Court then unequivocally rejected the Twenty-first Amendment as a basis for sustaining state liquor regulations that otherwise violated the Equal Protection Clause:

"Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked: 'Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.' P. Brest, Processes of Constitutional Decisionmaking, Cases and Materials, 258 (1975). Any departures from this historical view have been limited and sporadic." *Ibid.*

Cf. *Wisconsin* v. *Constantineau*, 400 U. S. 433. Surely the First Amendment is entitled to a status equal to the Fourteenth Amendment.

[14] Ironically, today the Court adopts an argument that the appellant expressly disclaimed during the oral argument in *LaRue:*

"QUESTION: Mr. Porter, in your argument here, is it based at all on the Twenty-First Amendment, dealing with the State authority over regulation of alcoholic beverages?

"MR. PORTER: Based to the extent that if we are in the First Amendment area, then as far as balancing the State's interests, we submit that both the traditional power that a State has had over the conditions surrounding the sale of alcoholic beverages and the power given to the States under the Twenty-First Amendment must be considered in balancing the State interests, that these are substantial and important State interests, where we're talking about the conditions surrounding the sale and consumption of alcoholic beverages.

"We have never argued, nor would we ever argue, that the Twenty-First Amendment would automatically override the First Amendment, or any other part of the Constitution. We only urge that——

"QUESTION: Well, it has been held that the Twenty-First Amendment overrode a great deal of the commerce clause, hasn't it?

"MR. PORTER: Well,——

"QUESTION: And it does, by its terms.

"MR. PORTER: That's correct, but I——

"QUESTION: And it has been held that the Twenty-First Amendment

State's ordinary police powers are adequate to support the prohibition of nuisances in taverns or elsewhere. Cf. *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50.

Although I voted to deny certiorari and allow the decision of the highest court of the State of New York to stand, certiorari having been granted, I dissent from the Court's disposition of the case on the basis of a blatantly incorrect reading of the Twenty-first Amendment.

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overrode a good deal of the equal protection clause of the Fourteenth Amendment, hasn't it? It was in the *Younger* case.

"MR. PORTER: Yes, but I would submit that—or I would, myself, attempt to temper that somewhat, to the extent I think it shows an overriding State interest in weighing between the commerce clause and the Twenty-First Amendment, where you get up in equal protection, where you get up into the First Amendment or some so-called, alleged, preferred amendments of the Constitution.

"As I said, we do not argue that it overrides the First Amendment. If we're dealing in a First Amendment area, that great weight should be given to the State's interest and power under the Twenty-First Amendment, in balancing and weighing, the State interest outweigh[s] the State interest to be protected under the First Amendment." Tr. of Oral Arg. in *California* v. *LaRue*, O. T. 1972, No. 71–36, pp. 10–12.

UNITED STATES *v.* LOUISIANA ET AL. (LOUISIANA BOUNDARY CASE)

ON BILL OF COMPLAINT

No. 9, Orig. Decided March 17, 1975, and April 28, 1980—Decree entered March 17, 1975—Supplemental decree entered June 16, 1975—Final decree entered June 22, 1981

Final decree entered.

Opinion reported: 446 U. S. 253; decree reported: 420 U. S. 529; supplemental decree reported: 422 U. S. 13.

The Supplemental Report of the Special Master is received and ordered filed.

FINAL DECREE

On April 28, 1980, this Court resolved all remaining issues between the United States and the State of Louisiana and returned the case to the Special Master for a "determination of the final amount due and owing, and the method of payment." 446 U. S. 253, 272–273. The parties have agreed upon these matters, have submitted to the Special Master a proposed final decree, and the Special Master, with the concurrence of both parties, has recommended its entry by the Court.

Accordingly,

IT IS ORDERED, ADJUDGED, AND DECREED:

1. As against the Defendant State of Louisiana and all persons claiming under it, the United States has exclusive rights to explore the area of the Continental Shelf lying seaward of the line described in Exhibit A hereof, and to exploit the natural resources of said area; the State of Louisiana is not entitled to any interest in such lands, minerals, and resources, except as may be provided by 43 U. S. C. § 1337 (g), and said State, its privies, assigns, lessees, and other persons claiming under it are hereby enjoined from interfering with

the rights of the United States in such lands, minerals and resources.

2. As against the plaintiff United States and all persons claiming under it, the State of Louisiana has exclusive rights to explore the area lying shoreward of the line described in Exhibit A hereof, and to exploit the natural resources of said area, with the exceptions provided by Section 5 of the Submerged Lands Act, 67 Stat. 32, 43 U. S. C. § 1313; the United States is not entitled to any interest in such lands, minerals, and resources and said United States, its privies, assigns, lessees and other persons claiming under it are hereby enjoined from interfering with the rights of the State of Louisiana in such lands, minerals and resources.

3. The line described in Exhibit A hereof is a line three geographic miles seaward of the coastline described in Exhibit A to the Decree of June 16, 1975 (422 U. S. 13, 19–32). Except as otherwise provided for limited past periods by paragraph 10 and Exhibit B of the said Decree of June 16, 1975, these two lines shall supersede all prior descriptions and be deemed to define the coastline and its three-mile projection for all periods present and past. Moreover, until and unless superseded by a subsequent final decree of this Court or agreement of the parties, the line described in Exhibit A hereof shall remain in effect for all purposes relevant to the Submerged Lands Act, 43 U. S. C. §§ 1301–1315, including exploitation of mineral resources; and, with respect to any period during which this line remains in effect, neither party shall ever be held to account to the other for or reimburse the other for any revenues derived from or attributable to sales, leases, licenses or exploitation of lands, minerals or resources adjudicated to that party by paragraph 1 or paragraph 2 hereof.

4. All prior accountings, claims and objections affecting the liability of one party to the other with respect to revenues derived from exploitation of offshore submerged lands and resources before June 16, 1975, and not impounded pursuant

to the Interim Agreement of October 12, 1956, have been resolved. However, notwithstanding anything to the contrary in any previous decree of this Court or in the Interim Agreement of October 12, 1956, this net balance shall not be payable until the accountings provided for in paragraphs 5 and 6 hereof shall have been filed and settled, and the said net balance shall be subject to offset against the liability resulting from those accountings.

5. Not later than December 1, 1981, the State of Louisiana shall render to the United States and file with the Court a true, full and accurate account of all revenues, other than severance taxes, pipeline rentals, and administrative charges, derived from or attributable to the exploitation of lands, minerals or resources within the area described in paragraph 1 hereof since June 16, 1975. Where such revenues are derived from leases embracing areas on both sides of the line described in Exhibit A hereof, they shall be apportioned as follows: as to bonuses and rentals, on the basis of relative acreage; as to royalties, on the basis of the location of the well completion point, except when an outstanding agreement between the parties specifies a different basis of allocation which, in that event, shall govern.

6. Not later than December 1, 1981, the United States shall render to the State of Louisiana and file with the Court a true, full and accurate accounting of all revenues, other than pipeline rentals and administrative charges, which remain impounded pursuant to the Interim Agreement of October 12, 1956, and which are derived from or attributable to the exploitation of lands, minerals or resources within the area described in paragraph 2 hereof or, for the limited periods there specified, areas landward of the lines described in Exhibit B hereof. The allocation of revenues from leases embracing areas on both sides of the line described in Exhibit A hereof or, for the relevant periods, Exhibit B hereof, shall be on the same basis as set forth in paragraph 5 hereof.

7. Any objections to the accounting required by paragraphs

5 and 6 hereof shall be filed with the Court and served on the other party not later than January 1, 1982. Immediately after January 1, 1982, any undisputed net balance resulting from the unchallenged portions of the accountings required by paragraphs 5 and 6 hereof and the liability specified in paragraph 4 hereof, shall be paid by the party whose net liability is greater to the other party, notwithstanding any outstanding objections as to other portions of the accountings and notwithstanding any provisions barring offsets in prior decrees or the Interim Agreement of October 12, 1956. Any remaining net balance shall be paid promptly after objections are resolved.

8. Nothing in this decree shall affect the rights or obligations of either party with respect to its lessees or other third parties, whether arising from the Interim Agreement of October 12, 1956, or otherwise. Nor shall anything in this decree affect any rights or obligations arising under present or future unitization, operating, enhanced recovery, commingling, or other similar agreements between the parties or with others.

9. Nothing in this decree or in the proceedings leading to it shall prejudice any rights, claims, or defenses of the State of Louisiana as to its maritime lateral boundaries with any other state, which boundaries are not at issue in this litigation, nor shall the United States in any way be prejudiced hereby as to such matters.

10. The Court retains jurisdiction to entertain such further proceedings, enter such orders and issue such writs as may from time to time be deemed necessary or advisable to resolve any disputes that may arise over the accountings provided for in this decree, and to give proper force and effect to its previous orders or decrees herein or to this decree. In all other respects, this is a final decree; and the Interim Agreement of October 12, 1956, is terminated for all purposes as of 5 p.m. on the first day of January, 1982, or the date on which any objections to accountings are finally resolved.

EXHIBIT A

	X	Y
BEGINNING AT	2769357	575650
BY STRAIGHT LINE TO	2790258	526390
BY ARC CENTERED AT	2779032	512013
TO	2791385	525434
BY STRAIGHT LINE TO	2793119	523838
BY ARC CENTERED AT	2780766	510417
TO	2794594	522313
BY STRAIGHT LINE TO	2795887	520810
BY ARC CENTERED AT	2782059	508914
TO	2796579	519954
BY STRAIGHT LINE TO	2799209	516495
BY ARC CENTERED AT	2784689	505455
TO	2800441	514653
BY STRAIGHT LINE TO	2804270	508096
BY ARC CENTERED AT	2788518	498898
TO	2804495	507699
BY STRAIGHT LINE TO	2806028	504916
BY ARC CENTERED AT	2790051	496115
TO	2807014	502822
BY STRAIGHT LINE TO	2808653	498677
BY ARC CENTERED AT	2791690	491970
TO	2809151	497245
BY STRAIGHT LINE TO	2812250	486987
BY ARC CENTERED AT	2794789	481712
TO	2812519	485996
BY STRAIGHT LINE TO	2813932	480148
BY ARC CENTERED AT	2796202	475864
TO	2814262	478425
BY STRAIGHT LINE TO	2815269	471324
BY ARC CENTERED AT	2797209	468763
TO	2815426	469688
BY STRAIGHT LINE TO	2815673	464823
BY ARC CENTERED AT	2797456	463898
TO	2815697	463895
BY STRAIGHT LINE TO	2815696	458116
BY ARC CENTERED AT	2797455	458119
TO	2815657	456928
BY STRAIGHT LINE TO	2815269	450999

	X	Y
BY ARC CENTERED AT	2797067	452190
TO	2815171	449960
BY STRAIGHT LINE TO	2813957	440103
BY ARC CENTERED AT	2795853	442333
TO	2813809	439123
BY STRAIGHT LINE TO	2812678	432796
BY ARC CENTERED AT	2794722	436006
TO	2812419	431584
BY STRAIGHT LINE TO	2810957	425733
BY ARC CENTERED AT	2793260	430155
TO	2810699	424807
BY STRAIGHT LINE TO	2807854	415530
BY ARC CENTERED AT	2790415	420878
TO	2807572	414684
BY STRAIGHT LINE TO	2805322	408452
BY ARC CENTERED AT	2788165	414646
TO	2805227	408196
BY STRAIGHT LINE TO	2803786	404384
BY ARC CENTERED AT	2786724	410834
TO	2803319	403263
BY STRAIGHT LINE TO	2799845	395648
BY ARC CENTERED AT	2783250	403219
TO	2798971	393968
BY STRAIGHT LINE TO	2795394	387889
BY ARC CENTERED AT	2779673	397140
TO	2795311	387750
BY STRAIGHT LINE TO	2793560	384834
BY ARC CENTERED AT	2777922	394224
TO	2792249	382934
BY STRAIGHT LINE TO	2790814	381113
BY ARC CENTERED AT	2776487	392403
TO	2789360	379480
BY ARC CENTERED AT	2774670	390293
TO	2788262	378129
BY STRAIGHT LINE TO	2786553	375045
BY ARC CENTERED AT	2770599	383887
TO	2785045	372750
BY STRAIGHT LINE TO	2783942	371319
BY STRAIGHT LINE TO	2783792	371062

	X	Y
BY ARC CENTERED AT	2768031	380244
TO	2780548	366976
BY STRAIGHT LINE TO	2775735	360553
BY ARC CENTERED AT	2761138	371491
TO	2775111	359766
BY STRAIGHT LINE TO	2773031	357287
BY ARC CENTERED AT	2757465	366796
TO	2771721	355417
BY STRAIGHT LINE TO	2770633	354054
BY STRAIGHT LINE TO	2770505	353847
BY ARC CENTERED AT	2755015	363480
TO	2767788	350458
BY STRAIGHT LINE TO	2761994	344775
BY ARC CENTERED AT	2749221	357797
TO	2760703	343624
BY STRAIGHT LINE TO	2757791	341265
BY ARC CENTERED AT	2746309	355438
TO	2756022	339999
BY STRAIGHT LINE TO	2754136	338812
BY STRAIGHT LINE TO	2742173	323079
BY ARC CENTERED AT	2727653	334120
TO	2741983	322834
BY STRAIGHT LINE TO	2741182	321817
BY ARC CENTERED AT	2726852	333103
TO	2738042	318698
BY STRAIGHT LINE TO	2736381	317408
BY STRAIGHT LINE TO	2736060	316935
BY STRAIGHT LINE TO	2732627	311249
BY ARC CENTERED AT	2717012	320677
TO	2731416	309486
BY STRAIGHT LINE TO	2729640	307200
BY ARC CENTERED AT	2715236	318391
TO	2728702	306088
BY STRAIGHT LINE TO	2728099	305428
BY ARC CENTERED AT	2714633	317731
TO	2725197	302861
BY STRAIGHT LINE TO	2723888	301931
BY ARC CENTERED AT	2713324	316801
TO	2720770	300149

	X	Y
BY STRAIGHT LINE TO	2719218	299455
BY ARC CENTERED AT	2711772	316107
TO	2714238	298034
BY STRAIGHT LINE TO	2704480	294684
BY STRAIGHT LINE TO	2704099	293666
BY ARC CENTERED AT	2687014	300054
TO	2701338	288761
BY STRAIGHT LINE TO	2699382	286280
BY ARC CENTERED AT	2685058	297573
TO	2697436	284175
BY STRAIGHT LINE TO	2699302	266715
BY ARC CENTERED AT	2688235	252215
TO	2704468	260534
BY ARC CENTERED AT	2689305	250395
TO	2707507	251577
BY ARC CENTERED AT	2700735	234640
TO	2717908	240788
BY ARC CENTERED AT	2701500	232820
TO	2719022	237890
BY ARC CENTERED AT	2707635	223640
TO	2721632	235337
BY STRAIGHT LINE TO	2736873	228413
BY ARC CENTERED AT	2738320	210230
TO	2745585	226961
BY ARC CENTERED AT	2738938	209975
TO	2749646	224742
BY ARC CENTERED AT	2750755	206535
TO	2759837	222354
BY ARC CENTERED AT	2755325	204680
TO	2773229	201192
BY ARC CENTERED AT	2755178	203815
TO	2770763	194337
BY ARC CENTERED AT	2754100	186915
TO	2771780	191404
BY ARC CENTERED AT	2754263	186316
TO	2772100	182502
BY ARC CENTERED AT	2753885	183460
TO	2765449	169354
BY ARC CENTERED AT	2752470	182170

	X	Y
TO	2761213	166161
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TO	2752202	163101
BY ARC CENTERED AT	2750586	181270
TO	2749611	163055
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TO	2748316	161869
BY ARC CENTERED AT	2734720	174030
TO	2747824	161341
BY STRAIGHT LINE TO	2746249	159715
BY ARC CENTERED AT	2728153	162005
TO	2746094	158715
BY STRAIGHT LINE AT	2745156	153600
BY ARC CENTERED AT	2727215	156890
TO	2745054	153083
BY ARC CENTERED AT	2726951	150846
TO	2743622	143444
BY ARC CENTERED AT	2726105	148530
TO	2731258	131033
BY STRAIGHT LINE TO	2717872	114220
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TO	2711432	102737
BY ARC CENTERED AT	2699695	116700
TO	2694008	99369
BY ARC CENTERED AT	2697850	117200
TO	2683320	106173
BY STRAIGHT LINE TO	2682980	106621
BY ARC CENTERED AT	2697510	117648
TO	2679799	113283
BY STRAIGHT LINE TO	2679589	114135
BY ARC CENTERED AT	2697300	118500
TO	2679155	116635
BY ARC CENTERED AT	2685325	133800
TO	2670977	122536
BY STRAIGHT LINE TO	2670888	122588
BY STRAIGHT LINE TO	2656605	119022
BY ARC CENTERED AT	2641835	129725
TO	2656150	118421
BY STRAIGHT LINE TO	2653860	115521

	X	Y
BY ARC CENTERED AT	2639545	126825
TO	2648682	111038
BY STRAIGHT LINE TO	2648610	110974
BY STRAIGHT LINE TO	2648531	110887
BY STRAIGHT LINE TO	2646419	107265
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TO	2646250	106981
BY STRAIGHT LINE TO	2644270	103721
BY ARC CENTERED AT	2628680	113190
TO	2642494	101278
BY STRAIGHT LINE TO	2640182	98597
BY ARC CENTERED AT	2624995	108700
TO	2638408	96339
BY STRAIGHT LINE TO	2638210	96123
BY STRAIGHT LINE TO	2637530	95377
BY ARC CENTERED AT	2624045	107660
TO	2637471	95312
BY STRAIGHT LINE TO	2635351	93007
BY ARC CENTERED AT	2621925	105355
TO	2634923	92558
BY STRAIGHT LINE TO	2633653	91268
BY ARC CENTERED AT	2620655	104065
TO	2631973	89760
BY STRAIGHT LINE TO	2631344	89262
BY STRAIGHT LINE TO	2630156	87770
BY ARC CENTERED AT	2615885	99131
TO	2630068	87661
BY STRAIGHT LINE TO	2629389	86821
BY STRAIGHT LINE TO	2626027	82661
BY STRAIGHT LINE TO	2624340	80576
BY ARC CENTERED AT	2610160	92050
TO	2621555	77806
BY STRAIGHT LINE TO	2621180	77506
BY ARC CENTERED AT	2609785	91750
TO	2617996	75462
BY STRAIGHT LINE TO	2617391	75157
BY ARC CENTERED AT	2609180	91445
TO	2597416	77505
BY STRAIGHT LINE TO	2595526	79100

	X	Y
BY ARC CENTERED AT	2607290	93040
TO	2589664	97736
BY ARC CENTERED AT	2607455	93710
TO	2591541	102625
BY STRAIGHT LINE TO	2592751	104785
BY ARC CENTERED AT	2608665	95870
TO	2593838	106495
BY STRAIGHT LINE TO	2595167	108350
BY STRAIGHT LINE TO	2596041	109955
BY ARC CENTERED AT	2614270	110615
TO	2597233	117130
BY STRAIGHT LINE TO	2597210	155899
BY ARC CENTERED AT	2614790	160765
TO	2596949	156969
BY STRAIGHT LINE TO	2596342	158695
BY ARC CENTERED AT	2613550	164745
TO	2595312	165072
BY STRAIGHT LINE TO	2595316	165282
BY ARC CENTERED AT	2607710	178665
TO	2594008	166625
BY STRAIGHT LINE TO	2592668	168150
BY ARC CENTERED AT	2606370	180190
TO	2590016	172111
BY STRAIGHT LINE TO	2588771	174631
BY ARC CENTERED AT	2605125	182710
TO	2587979	176487
BY ARC CENTERED AT	2604220	184790
TO	2587325	177913
BY STRAIGHT LINE TO	2586460	180038
BY ARC CENTERED AT	2603355	186915
TO	2585856	181767
BY ARC CENTERED AT	2602425	189395
TO	2585513	182560
BY STRAIGHT LINE TO	2585309	183065
BY STRAIGHT LINE TO	2585048	183583
BY STRAIGHT LINE TO	2584220	184785
BY STRAIGHT LINE TO	2581909	187130
BY ARC CENTERED AT	2594900	199935
TO	2581526	187531

	X	Y
BY ARC CENTERED AT	2589100	204125
TO	2579034	188914
BY STRAIGHT LINE TO	2577635	189839
BY ARC CENTERED AT	2583790	207010
TO	2576863	190136
BY STRAIGHT LINE TO	2572518	191920
BY ARC CENTERED AT	2576174	209790
TO	2567200	193910
BY ARC CENTERED AT	2574890	210450
TO	2566472	194268
BY STRAIGHT LINE TO	2564469	194807
BY ARC CENTERED AT	2565940	212988
TO	2559750	195830
BY STRAIGHT LINE TO	2559112	196060
BY ARC CENTERED AT	2562149	214046
TO	2557272	196470
BY STRAIGHT LINE TO	2557019	196540
BY STRAIGHT LINE TO	2552324	197553
BY ARC CENTERED AT	2556172	215383
TO	2551363	197788
BY STRAIGHT LINE TO	2414967	172673
BY STRAIGHT LINE TO	2410270	168699
BY STRAIGHT LINE TO	2406006	164749
BY ARC CENTERED AT	2393610	178130
TO	2404972	163860
BY STRAIGHT LINE TO	2397195	157668
BY ARC CENTERED AT	2385833	171938
TO	2396858	157406
BY STRAIGHT LINE TO	2392712	154261
BY STRAIGHT LINE TO	2389824	151968
BY ARC CENTERED AT	2376485	164409
TO	2387438	149823
BY STRAIGHT LINE TO	2385828	148614
BY ARC CENTERED AT	2374875	163200
TO	2382739	146742
BY STRAIGHT LINE TO	2382463	146610
BY STRAIGHT LINE TO	2379481	144718
BY ARC CENTERED AT	2369709	160120
TO	2378913	144372

	X	Y
BY STRAIGHT LINE TO	2376899	143195
BY ARC CENTERED AT	2367695	158943
TO	2374967	142215
BY STRAIGHT LINE TO	2373712	141669
BY ARC CENTERED AT	2364392	157349
TO	2367743	139419
BY STRAIGHT LINE TO	2365248	138185
BY ARC CENTERED AT	2354070	152599
TO	2349744	134879
BY STRAIGHT LINE TO	2348372	134394
BY STRAIGHT LINE TO	2346096	133534
BY ARC CENTERED AT	2339651	150598
TO	2344530	133022
BY STRAIGHT LINE TO	2342882	132565
BY STRAIGHT LINE TO	2341883	132218
BY STRAIGHT LINE TO	2334775	129342
BY ARC CENTERED AT	2327933	146251
TO	2333794	128978
BY STRAIGHT LINE TO	2328327	127123
BY ARC CENTERED AT	2322466	144396
TO	2326959	126717
BY STRAIGHT LINE TO	2326906	126704
BY ARC CENTERED AT	2319608	143421
TO	2324588	125873
BY STRAIGHT LINE TO	2322643	125321
BY ARC CENTERED AT	2317663	142869
TO	2322368	125246
BY STRAIGHT LINE TO	2318607	124242
BY ARC CENTERED AT	2313902	141865
TO	2314460	123633
BY STRAIGHT LINE TO	2312762	123581
BY ARC CENTERED AT	2312204	141813
TO	2311215	123599
BY STRAIGHT LINE TO	2309557	123689
BY ARC CENTERED AT	2310546	141903
TO	2308711	123755
BY ARC CENTERED AT	2300326	139954
TO	2308388	123592
BY STRAIGHT LINE TO	2306600	122711

	X	Y
BY ARC CENTERED AT	2298538	139073
TO	2302489	121265
BY STRAIGHT LINE TO	2299992	120711
BY ARC CENTERED AT	2296041	138519
TO	2295411	120289
BY STRAIGHT LINE TO	2294514	120320
BY ARC CENTERED AT	2295144	138550
TO	2288532	121550
BY STRAIGHT LINE TO	2287771	121846
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TO	2287412	121990
BY STRAIGHT LINE TO	2284138	122399
BY ARC CENTERED AT	2286402	140499
TO	2283007	122577
BY STRAIGHT LINE TO	2277807	123562
BY ARC CENTERED AT	2281202	141484
TO	2276614	123830
BY STRAIGHT LINE TO	2270161	125507
BY ARC CENTERED AT	2274749	143161
TO	2267618	126372
BY STRAIGHT LINE TO	2263074	128302
BY ARC CENTERED AT	2270205	145091
TO	2262736	128450
BY STRAIGHT LINE TO	2256981	131033
BY ARC CENTERED AT	2264450	147674
TO	2255335	131874
BY STRAIGHT LINE TO	2251881	133867
BY STRAIGHT LINE TO	2250291	134590
BY STRAIGHT LINE TO	2229997	129637
BY STRAIGHT LINE TO	2228299	128761
BY ARC CENTERED AT	2219935	144971
TO	2227466	128358
BY STRAIGHT LINE TO	2225677	127547
BY ARC CENTERED AT	2218146	144160
TO	2222547	126458
BY STRAIGHT LINE TO	2219572	125719
BY STRAIGHT LINE TO	2212203	123742
BY STRAIGHT LINE TO	2203722	121100
BY ARC CENTERED AT	2198296	138515

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	X	Y
TO	2202941	120876
BY STRAIGHT LINE TO	2196975	119305
BY ARC CENTERED AT	2192330	136944
TO	2195302	118947
BY STRAIGHT LINE TO	2189988	118070
BY STRAIGHT LINE TO	2188596	117772
BY ARC CENTERED AT	2184788	135611
TO	2185156	117374
BY ARC CENTERED AT	2182166	135368
TO	2181100	117159
BY STRAIGHT LINE TO	2179579	117248
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TO	2177979	117412
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TO	2168753	116704
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TO	2160352	116985
BY STRAIGHT LINE TO	2156273	117355
BY ARC CENTERED AT	2157920	135521
TO	2154346	117634
BY ARC CENTERED AT	2155349	135847
TO	2149793	118473
BY ARC CENTERED AT	2147751	136599
TO	2149162	118413
BY STRAIGHT LINE TO	2145000	118090
BY ARC CENTERED AT	2143589	136276
TO	2143589	118035
BY STRAIGHT LINE TO	2139529	118035
BY ARC CENTERED AT	2139529	136276
TO	2137975	118102
BY STRAIGHT LINE TO	2136677	118213
BY ARC CENTERED AT	2138231	136387
TO	2134698	118492
BY ARC CENTERED AT	2134210	136726
TO	2130790	118809
BY STRAIGHT LINE TO	2129669	119023

	X	Y
BY ARC CENTERED AT	2133089	136940
TO	2126158	120067
BY STRAIGHT LINE TO	2122637	121514
BY STRAIGHT LINE TO	2122091	121684
BY STRAIGHT LINE TO	2118740	122394
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TO	2114776	123724
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BY ARC CENTERED AT	2118829	141971
TO	2108033	127268
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TO	2103682	131314
BY STRAIGHT LINE TO	2102934	132273
BY ARC CENTERED AT	2117317	143491
TO	2112203	161000
BY STRAIGHT LINE TO	2112518	161092
BY ARC CENTERED AT	2117632	143583
TO	2119073	161767
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TO	2117168	163700
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TO	2116319	164410
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TO	2116191	164506
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TO	2114372	165634
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TO	2110623	165468
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TO	2102599	165378
BY ARC CENTERED AT	2103313	183605
TO	2095246	167245
BY ARC CENTERED AT	2098954	185105
TO	2095140	167268
BY STRAIGHT LINE TO	2087218	168962
BY ARC CENTERED AT	2086261	187177
TO	2082361	169358
BY STRAIGHT LINE TO	2081470	169553

	X	Y
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TO	2076984	171174
BY ARC CENTERED AT	2077417	189409
TO	2071846	172040
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BY ARC CENTERED AT	2076201	189799
TO	2064747	175603
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BY ARC CENTERED AT	2071131	195080
TO	2058843	181599
BY ARC CENTERED AT	2062055	199555
TO	2057134	181991
BY STRAIGHT LINE TO	2053779	182931
BY ARC CENTERED AT	2058700	200495
TO	2053474	183019
BY STRAIGHT LINE TO	2052967	183053
BY STRAIGHT LINE TO	2051871	183006
BY ARC CENTERED AT	2051090	201230
TO	2050845	182991
BY STRAIGHT LINE TO	2048985	183016
BY ARC CENTERED AT	2049230	201255
TO	2048033	183054
BY STRAIGHT LINE TO	2044865	183262
BY STRAIGHT LINE TO	2041482	183446
BY ARC CENTERED AT	2042475	201660
TO	2037473	184119
BY STRAIGHT LINE TO	2033139	185355
BY STRAIGHT LINE TO	2032934	185387
BY ARC CENTERED AT	2035775	203405
TO	2029791	186174
BY STRAIGHT LINE TO	2027401	187004
BY ARC CENTERED AT	2033385	204235
TO	2026834	187211
BY STRAIGHT LINE TO	2023510	188491
BY STRAIGHT LINE TO	2020959	189327
BY ARC CENTERED AT	2026640	206660
TO	2019190	190010

	X	Y
BY STRAIGHT LINE TO	2016613	191163
BY STRAIGHT LINE TO	2015796	191414
BY ARC CENTERED TO	2021155	208850
TO	2013823	192148
BY STRAIGHT LINE TO	2010121	193773
BY ARC CENTERED AT	2017453	210475
TO	2007660	195086
BY STRAIGHT LINE TO	2006450	195856
BY ARC CENTERED AT	2016243	211245
TO	2002812	198903
BY STRAIGHT LINE TO	2001329	200516
BY STRAIGHT LINE TO	1998627	203119
BY STRAIGHT LINE TO	1996877	204647
BY ARC CENTERED AT	2008873	218388
TO	1994484	207177
BY STRAIGHT LINE TO	1993669	208223
BY ARC CENTERED AT	2008058	219434
TO	1992024	210737
BY STRAIGHT LINE TO	1991724	211291
BY STRAIGHT LINE TO	1991392	211653
BY STRAIGHT LINE TO	1987527	215292
BY ARC CENTERED AT	2000030	228573
TO	1985881	217061
BY STRAIGHT LINE TO	1984419	218858
BY ARC CENTERED AT	1998568	230270
TO	1982726	221329
BY STRAIGHT LINE TO	1981279	223864
BY ARC CENTERED AT	1987818	240892
TO	1975782	227186
BY ARC CENTERED AT	1987371	241272
TO	1972054	231367
BY STRAIGHT LINE TO	1937446	246505
BY ARC CENTERED AT	1933172	264238
TO	1920501	251117
BY ARC CENTERED AT	1924399	268936
TO	1916888	252314
BY ARC CENTERED AT	1914373	270380
TO	1900989	257987
BY ARC CENTERED AT	1896827	275747

	X	Y
TO	1895100	257588
BY ARC CENTERED AT	1882306	270590
TO	1867537	259884
BY ARC CENTERED AT	1872418	277460
TO	1858534	265630
BY ARC CENTERED AT	1843467	275912
TO	1848729	258447
BY ARC CENTERED AT	1835344	270839
TO	1841538	253682
BY ARC CENTERED AT	1834019	270301
TO	1817077	263541
BY ARC CENTERED AT	1833527	271423
TO	1815531	274401
BY ARC CENTERED AT	1820994	291804
TO	1808997	278064
BY ARC CENTERED AT	1809845	296285
TO	1792971	289357
BY ARC CENTERED AT	1791584	307545
TO	1773422	305849
BY ARC CENTERED AT	1783067	321331
TO	1771284	307407
BY ARC CENTERED AT	1782391	321876
TO	1769317	309156
BY ARC CENTERED AT	1778769	324757
TO	1763172	315299
BY ARC CENTERED AT	1763190	333540
TO	1762008	315338
BY STRAIGHT LINE TO	1761238	315388
BY ARC CENTERED AT	1762420	333590
TO	1761004	315404
BY ARC CENTERED AT	1758630	333490
TO	1751585	316665
BY STRAIGHT LINE TO	1749527	316597
BY STRAIGHT LINE TO	1745678	316238
BY STRAIGHT LINE TO	1741757	315745
BY STRAIGHT LINE TO	1738098	314155
BY ARC CENTERED AT	1730831	330886
TO	1737269	313819
BY STRAIGHT LINE TO	1733962	312572

	X	Y
BY STRAIGHT LINE TO	1733065	312110
BY ARC CENTERED AT	1724713	328326
TO	1729983	310863
BY STRAIGHT LINE TO	1729557	310735
BY STRAIGHT LINE TO	1727510	309315
BY ARC CENTERED AT	1717114	324303
TO	1726647	308752
BY STRAIGHT LINE TO	1721463	305574
BY STRAIGHT LINE TO	1721351	305467
BY ARC CENTERED AT	1708756	318661
TO	1715565	301739
BY STRAIGHT LINE TO	1713599	300948
BY ARC CENTERED AT	1706790	317870
TO	1711471	300240
BY STRAIGHT LINE TO	1707761	299255
BY ARC CENTERED AT	1703080	316885
TO	1706765	299020
BY STRAIGHT LINE TO	1704365	298525
BY ARC CENTERED AT	1700680	316390
TO	1702465	298237
BY STRAIGHT LINE TO	1698144	297812
BY ARC CENTERED AT	1696359	315965
TO	1696239	297725
BY STRAIGHT LINE TO	1692448	297750
BY ARC CENTERED AT	1692568	315990
TO	1691302	297793
BY STRAIGHT LINE TO	1688714	297973
BY ARC CENTERED AT	1689980	316170
TO	1687709	298071
BY STRAIGHT LINE TO	1684999	298411
BY ARC CENTERED AT	1687270	316510
TO	1683393	298686
BY STRAIGHT LINE TO	1674668	300584
BY ARC CENTERED AT	1678545	318408
TO	1674182	300697
BY STRAIGHT LINE TO	1670983	301485
BY ARC CENTERED AT	1675346	319196
TO	1670472	301619
BY STRAIGHT LINE TO	1666144	302819

	X	Y
BY ARC CENTERED AT	1671018	320396
TO	1665216	303103
BY STRAIGHT LINE TO	1663698	303612
BY STRAIGHT LINE TO	1662427	303960
BY STRAIGHT LINE TO	1661678	304151
BY STRAIGHT LINE TO	1659494	304616
BY ARC CENTERED AT	1663290	322457
TO	1659476	304620
BY STRAIGHT LINE TO	1658120	304910
BY ARC CENTERED AT	1658887	323134
TO	1656354	305070
BY ARC CENTERED AT	1655896	323305
TO	1652650	305356
BY STRAIGHT LINE TO	1650184	305802
BY ARC CENTERED AT	1653430	323751
TO	1648635	306152
BY STRAIGHT LINE TO	1647051	306584
BY ARC CENTERED AT	1649308	324684
TO	1643681	307333
BY STRAIGHT LINE TO	1636292	308607
BY STRAIGHT LINE TO	1627130	309897
BY STRAIGHT LINE TO	1620757	310390
BY ARC CENTERED AT	1622420	328555
TO	1619895	310490
BY STRAIGHT LINE TO	1614565	311235
BY ARC CENTERED AT	1617090	329300
TO	1613148	311491
BY STRAIGHT LINE TO	1611814	311591
BY ARC CENTERED AT	1613190	329780
TO	1609960	311828
BY STRAIGHT LINE TO	1606070	312528
BY ARC CENTERED AT	1609300	330480
TO	1604702	312829
BY STRAIGHT LINE TO	1604290	312866
BY ARC CENTERED AT	1605965	331030
TO	1601325	313389
BY STRAIGHT LINE TO	1601195	313403
BY ARC CENTERED AT	1603140	331540
TO	1598672	313855

	X	Y
BY STRAIGHT LINE TO	1596370	314437
BY STRAIGHT LINE TO	1596179	314483
BY STRAIGHT LINE TO	1592424	315063
BY ARC CENTERED AT	1595210	333090
TO	1591479	315235
BY ARC CENTERED AT	1594075	333290
TO	1589694	315583
BY ARC CENTERED AT	1593010	333520
TO	1589433	315634
BY STRAIGHT LINE TO	1588108	315899
BY ARC CENTERED AT	1591685	333785
TO	1585928	316477
BY STRAIGHT LINE TO	1584286	317023
BY STRAIGHT LINE TO	1582201	317563
BY ARC CENTERED AT	1586780	335220
TO	1581596	317732
BY STRAIGHT LINE TO	1576266	319312
BY ARC CENTERED AT	1581450	336800
TO	1575360	319606
BY STRAIGHT LINE TO	1570080	321476
BY ARC CENTERED AT	1576170	338670
TO	1569889	321545
BY STRAIGHT LINE TO	1565349	323210
BY ARC CENTERED AT	1571630	340335
TO	1563529	323992
BY STRAIGHT LINE TO	1563104	324202
BY STRAIGHT LINE TO	1561073	324994
BY ARC CENTERED AT	1567695	341990
TO	1558882	326020
BY STRAIGHT LINE TO	1558879	326021
BY ARC CENTERED AT	1564160	343480
TO	1556225	327056
BY STRAIGHT LINE TO	1556066	327133
BY STRAIGHT LINE TO	1553511	327894
BY ARC CENTERED AT	1558720	345375
TO	1551769	328511
BY STRAIGHT LINE TO	1549575	329415
BY ARC CENTERED AT	1553840	347150
TO	1546081	330642

	X	Y
BY STRAIGHT LINE TO	1543911	331662
BY ARC CENTERED AT	1551670	348170
TO	1541402	333094
BY STRAIGHT LINE TO	1540011	333646
BY ARC CENTERED AT	1546740	350600
TO	1537927	334630
BY STRAIGHT LINE TO	1531757	337418
BY ARC CENTERED AT	1539270	354040
TO	1530263	338178
BY STRAIGHT LINE TO	1527498	339748
BY ARC CENTERED AT	1536505	355610
TO	1526511	340351
BY STRAIGHT LINE TO	1526495	340356
BY ARC CENTERED AT	1532515	357575
TO	1523959	341466
BY ARC CENTERED AT	1531240	358190
TO	1522813	342013
BY STRAIGHT LINE TO	1516478	345313
BY STRAIGHT LINE TO	1505572	350398
BY ARC CENTERED AT	1513280	366930
TO	1504778	350792
BY STRAIGHT LINE TO	1493968	356487
BY ARC CENTERED AT	1502470	372625
TO	1493740	356609
BY STRAIGHT LINE TO	1488240	359607
BY STRAIGHT LINE TO	1483855	361809
BY ARC CENTERED AT	1492040	378110
TO	1483320	362089
BY STRAIGHT LINE TO	1481464	363099
BY STRAIGHT LINE TO	1472522	367321
BY STRAIGHT LINE TO	1464632	370389
BY ARC CENTERED AT	1471240	387390
TO	1464433	370467
BY STRAIGHT LINE TO	1461367	371700
BY STRAIGHT LINE TO	1455041	373829
BY STRAIGHT LINE TO	1449142	375498
BY ARC CENTERED AT	1454105	393050
TO	1447394	376089
BY STRAIGHT LINE TO	1443224	377739

	X	Y
BY ARC CENTERED AT	1449935	394700
TO	1442769	377926
BY STRAIGHT LINE TO	1437906	380003
BY STRAIGHT LINE TO	1435142	381048
BY STRAIGHT LINE TO	1431147	382502
BY ARC CENTERED AT	1431465	400740
TO	1426148	383291
BY STRAIGHT LINE TO	1423703	384036
BY ARC CENTERED AT	1429020	401485
TO	1421665	384793
BY STRAIGHT LINE TO	1421218	384903
BY ARC CENTERED AT	1425600	402610
TO	1417428	386302
BY STRAIGHT LINE TO	1411695	388054
BY STRAIGHT LINE TO	1406675	389181
BY STRAIGHT LINE TO	1400158	390267
BY STRAIGHT LINE TO	1395815	390681
BY STRAIGHT LINE TO	1390919	390971
BY ARC CENTERED AT	1392000	409180
TO	1390575	390995
BY STRAIGHT LINE TO	1386958	390977
BY STRAIGHT LINE TO	1385797	390942
BY STRAIGHT LINE TO	1383281	390516
BY ARC CENTERED AT	1380235	408500
TO	1382827	390444
BY STRAIGHT LINE TO	1380530	390115
BY STRAIGHT LINE TO	1379793	389887
BY ARC CENTERED AT	1363392	397870
TO	1364288	379651
BY STRAIGHT LINE TO	1363312	379603
BY ARC CENTERED AT	1362416	397822
TO	1348021	386619
BY STRAIGHT LINE TO	1347740	386685
BY STRAIGHT LINE TO	1339580	387874
BY STRAIGHT LINE TO	1332310	388694
BY STRAIGHT LINE TO	1328041	388886
BY STRAIGHT LINE TO	1323345	388897
BY STRAIGHT LINE TO	1318623	388814
BY STRAIGHT LINE TO	1313961	388548

	X	Y
BY STRAIGHT LINE TO	1309176	388114
BY STRAIGHT LINE TO	1299212	386972
BY STRAIGHT LINE TO	1294264	386189
BY ARC CENTERED AT	1291413	404205
TO	1293948	386141
BY STRAIGHT LINE TO	1288689	385403
BY ARC CENTERED AT	1286154	403467
TO	1288273	385350
BY STRAIGHT LINE TO	1282879	384719
BY ARC CENTERED AT	1280760	402836
TO	1282343	384664
BY STRAIGHT LINE TO	1277050	384203
BY ARC CENTERED AT	1275467	402375
TO	1276974	384197
BY STRAIGHT LINE TO	1266567	383334
BY STRAIGHT LINE TO	1261754	382855
BY STRAIGHT LINE TO	1256845	382176
BY STRAIGHT LINE TO	1252082	381444
BY STRAIGHT LINE TO	1247120	380489
BY ARC CENTERED AT	1243670	398400
TO	1246626	380401
BY STRAIGHT LINE TO	1243866	379947
BY STRAIGHT LINE TO	1240511	379144
BY STRAIGHT LINE TO	1238894	378640
BY STRAIGHT LINE TO	1234692	377218
BY ARC CENTERED AT	1228846	394497
TO	1233981	376994
BY ARC CENTERED AT	1225768	393281
TO	1230677	375713
BY STRAIGHT LINE TO	1229077	374980
BY ARC CENTERED AT	1219065	390227
TO	1227371	373987
BY STRAIGHT LINE TO	1226185	373381
BY STRAIGHT LINE TO	1227214	367277
BY ARC CENTERED AT	1209227	364245
TO	1214918	346915
BY STRAIGHT LINE TO	1213304	346385
BY STRAIGHT LINE TO	1212404.23	346089.54

SAID POINT BEING ON THE TEXAS-LOUISIANA BOUNDARY.

EXHIBIT B

From January, 1961 to December 6, 1969, the three-mile projection line in East Bay vicinity from base line point X=2,702,461; Y=124,148 to a baseline point X=2,641,835; Y=129,725 deviates from the present three-mile projection and may be described as follows:

	X	Y
By arc centered at	2702461	124148
To	2717902	114437
By arc centered at	2699815	116800
To	2711432	102737
By arc centered at	2699695	116700
To	2694008	99369
By arc centered at	2697850	117200
To	2683320	106173
By straight line to	2682980	106621
By arc centered at	2697510	117648
To	2679799	113283
By straight line to	2679589	114135
By an arc centered at	2697300	118500
To	2679559	114260
By an arc centered at	2685250	131590
To	2677482	115086
By an arc centered at	2684417	131957
To	2673065	117679
By an arc centered at	2683850	132390
To	2672411	118182
By an arc centered at	2682580	133325
To	2671159	119102
By straight line to	2655458	117595
By arc centered at	2641835	129725

Prior to January, 1961 the three-mile projection line in East Bay vicinity from base line point X=2,702,461; Y=124,148 to base line point X=2,641,835; Y=129,725 deviates from

the present three-mile projection and may be described as follows:

	X	Y
By arc centered at	2702461	124148
To	2716719	112772
By arc centered at	2699435	118600
To	2710698	104252
By arc centered at	2697850	117200
To	2683320	106173
By straight line to	2682980	106621
By arc centered at	2697510	117648
To	2679799	113283
By straight line to	2679589	114135
By an arc centered at	2697300	118500
To	2679559	114260
By an arc centered at	2685250	131590
To	2677482	115086
By an arc centered at	2684417	131957
To	2673065	117679
By an arc centered at	2683850	132390
To	2672411	118182
By an arc centered at	2682580	133325
To	2671159	119102
By straight line to	2655458	117595
By arc centered at	2641835	129725

Prior to December 6, 1969 the three-mile projection in the Pass du Bois vicinity from base line point X=2,614,270; Y=110,615 to base line point X=2,608,270; Y=178,325 deviates from the present three-mile projection and may be described as follows:

	X	Y
By arc centered at	2614270	110615
To	2597233	117130
By straight line to	2597212	152789
By arc centered at	2612771	162310
To	2595307	157043

	X	Y
By arc centered at	2612120	164118
To	2594046	166581
By arc centered at	2608270	178325

From November 19, 1959 to February 1, 1960 the three-mile projection in the Pass Tante Phine vicinity from base line point X=2,606,370; Y=180,190 to base line point X=2,598,335; Y=196,450 deviates from the present three-mile projection and may be described as follows:

	X	Y
By arc centered at	2606370	180190
To	2593225	167544
By arc centered at	2602000	183535
To	2583851	185362
By arc centered at	2598335	196450

From January 1, 1959 through March 31, 1959 and from March 1, 1964 through July 31, 1964 the three-mile projection north of Pass Tante Phine from base line point X=2,605,125; Y=182,710 to base line point X=2,600,780; Y=192,900 deviates from the present three-mile projection and may be described as follows:

	X	Y
By arc centered at	2605125	182710
To	2588206	175894
By arc centered at	2602763	186885
To	2584711	184268
By arc centered at	2600780	192900

JUSTICE MARSHALL took no part in the consideration or decision of this matter.

Reporter's Note

The next page is purposely numbered 901. The numbers between 753 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM JUNE 1 THROUGH JUNE 22, 1981

JUNE 1, 1981

Appeals Dismissed

No. 80–1694. ATWOOD VACUUM MACHINE CO. *v.* FORD MOTOR CO. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 392 So. 2d 1305.

No. 80–6502. PRENZLER *v.* PIKE ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 80–6646. WHITE *v.* UNITED STATES. Appeal from Ct. App. D. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Vacated and Remanded on Appeal

No. 80–6280. HARRIS *v.* GEORGIA. Appeal from Sup. Ct. Ga. Motion of appellant for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *Steagald* v. *United States,* 451 U. S. 204 (1981). Reported below: 246 Ga. 759, 272 S. E. 2d 719.

Certiorari Granted—Affirmed in Part and Reversed in Part.
(See No. 80–1205, *ante,* p. 155.)

Miscellaneous Orders

No. A–944. BUETTNER-JANUSCH *v.* UNITED STATES. C. A. 2d Cir. Application for stay and continued bail, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–915. BUREAU OF ECONOMIC ANALYSIS, UNITED STATES DEPARTMENT OF COMMERCE *v.* LONG ET AL. C. A. 9th Cir. Application for stay, presented to JUSTICE REHNQUIST, and by him referred to the Court, granted. The order heretofore entered by JUSTICE REHNQUIST on May 14, 1981, is continued pending the timely filing and disposition of a petition for writ of certiorari.

No. D–221. IN RE DISBARMENT OF LEIGHTON. Disbarment entered. [For earlier order herein, see 450 U. S. 976.]

No. D–225. IN RE DISBARMENT OF FLORSHEIM. Disbarment entered. [For earlier order herein, see 450 U. S. 977.]

No. D–240. IN RE DISBARMENT OF WALSH. It is ordered that John T. Walsh, of Youngstown, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–241. IN RE DISBARMENT OF PRIDE. It is ordered that Hemphill P. Pride II, of Columbia, S. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 80–327. VALLEY FORGE CHRISTIAN COLLEGE *v.* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., ET AL. C. A. 3d Cir. [Certiorari granted, 450 U. S. 909.] Motion of the Solicitor General for divided argument and for additional time for oral argument granted, and 10 additional minutes allotted for that purpose. Respondent Americans United for Separation of Church and State also allotted an additional 10 minutes for oral argument.

No. 80–6654. IN RE REYNOLDS. Petition for writ of habeas corpus denied.

No. 80–848. PIPER AIRCRAFT CO. *v.* REYNO, PERSONAL REPRESENTATIVE OF THE ESTATES OF FEHILLY ET AL.; and

No. 80–883. HARTZELL PROPELLER, INC. *v.* REYNO, PERSONAL REPRESENTATIVE OF THE ESTATES OF FEHILLY ET AL. C. A. 3d Cir. [Certiorari granted, 450 U. S. 909.] Motion of petitioners for divided argument granted. Request for additional time for oral argument denied.

No. 80–885. NATIONAL LABOR RELATIONS BOARD *v.* HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORP.; NATIONAL LABOR RELATIONS BOARD *v.* MALLEABLE IRON RANGE CO.; and

No. 80–1103. HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. [Certiorari granted, 450 U. S. 964.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 80–901. DONOVAN, SECRETARY OF LABOR *v.* DEWEY ET AL. D. C. E. D. Wis. [Probable jurisdiction noted *sub nom. Marshall* v. *Dewey*, 449 U. S. 1122.] Motion of appellant for leave to file a supplemental brief after argument granted.

No. 80–1430. ENGLE, CORRECTIONAL SUPERINTENDENT *v.* ISAAC; PERINI, CORRECTIONAL SUPERINTENDENT *v.* BELL; and ENGLE, CORRECTIONAL SUPERINTENDENT *v.* HUGHES. C. A. 6th Cir. [Certiorari granted, 451 U. S. 906.] Motion of respondent Howard Hughes for leave to proceed further herein *in forma pauperis* denied.

No. 80–1695. AIR LINE PILOTS ASSN., INTERNATIONAL *v.* PELAEZ DEL CASAL ET AL. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 80–6645. IN RE GREEN. Petition for writ of mandamus denied.

No. 80–1586. IN RE GULF OIL CORP. Petition for writ of mandamus denied. JUSTICE STEWART took no part in the consideration or decision of this petition.

Probable Jurisdiction Noted

No. 80–1290. CLEMENTS, GOVERNOR OF TEXAS, ET AL. *v.* FASHING ET AL. Appeal from C. A. 5th Cir. Probable jurisdiction noted. Reported below: 631 F. 2d 731.

No. 80–1431. IN RE R. M. J. Appeal from Sup. Ct. Mo. Probable jurisdiction noted. Reported below: 609 S. W. 2d 411.

No. 80–1666. LARSON, COMMISSIONER OF SECURITIES, MINNESOTA DEPARTMENT OF COMMERCE, ET AL. *v.* VALENTE ET AL. Appeal from C. A. 8th Cir. Probable jurisdiction noted. Reported below: 637 F. 2d 562.

No. 80–1681. VILLAGE OF HOFFMAN ESTATES ET AL. *v.* THE FLIPSIDE, HOFFMAN ESTATES, INC. Appeal from C. A. 7th Cir. Probable jurisdiction noted. JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 639 F. 2d 373.

Certiorari Granted

No. 80–1556. CORY, CONTROLLER OF CALIFORNIA, ET AL. *v.* WHITE, ATTORNEY GENERAL OF TEXAS, ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 629 F. 2d 397.

No. 80–1562. MARINE BANK *v.* WEAVER ET UX. C. A. 3d Cir. Certiorari granted. Reported below: 637 F. 2d 157.

No. 80–1614. JEWETT ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari granted. Reported below: 638 F. 2d 93.

Certiorari Denied. (See also No. 80–1205, *ante*, at 157, n. 2; and Nos. 80–1694, 80–6502, and 80–6646, *supra*.)

No. 80–1398. DOE ET AL. *v.* GOLDMAN ET AL. C. A. 1st Cir. Certiorari denied.

No. 79–1214. IOWA BEEF PROCESSORS, INC., ET AL. *v.* MEAT PRICE INVESTIGATORS ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 167.

No. 80–922. DONOVAN, SECRETARY OF LABOR *v.* ALABAMA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 366.

No. 80–1353. VAN DYK RESEARCH CORP. *v.* XEROX CORP. C. A. 3d Cir. Certiorari denied. Reported below: 631 F. 2d 251.

No. 80–1390. BELLER *v.* LEHMAN, SECRETARY OF THE NAVY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 632 F. 2d 788.

No. 80–1450. MCLEAN *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 392 So. 2d 1384.

No. 80–1512. BRINTON *v.* DEPARTMENT OF STATE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 204 U. S. App. D. C. 328, 636 F. 2d 600.

No. 80–1514. FONTENOT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 2d 921.

No. 80–1517. MAZZUCA *v.* UNITED STATES;
No. 80–6307. WILLIAMS *v.* UNITED STATES; and
No. 80–6309. JANOVICH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 634 F. 2d 1159.

No. 80–1543. AMDUR *v.* CITY OF CHICAGO. C. A. 7th Cir. Certiorari denied. Reported below: 638 F. 2d 37.

No. 80–1549. TEXPORTS STEVEDORE CO. ET AL. *v.* WINCHESTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 504.

No. 80–1558. LeBeouf Brothers Towing Co., Inc., et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 621 F. 2d 787.

No. 80–1638. First Empire Bank-New York, by its successor-in-interest Manufacturers & Traders Trust Company of Buffalo, New York, et al. *v.* Federal Deposit Insurance Corporation. C. A. 9th Cir. Certiorari denied. Reported below: 634 F. 2d 1222.

No. 80–1665. Ratcliff *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1203.

No. 80–1675. Spector et al. *v.* Maryland. Ct. App. Md. Certiorari denied. Reported below: 289 Md. 407, 425 A. 2d 197.

No. 80–1689. Fitzgerald *v.* Nations et al. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 610 S. W. 2d 48.

No. 80–1697. St. Louis Southwestern Railway Co. *v.* Mosley et al. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 942.

No. 80–1780. Schwenk *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 647 F. 2d 167.

No. 80–1784. Calhoun *v.* Bailar, Postmaster General of the United States, et al. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 145.

No. 80–1830. Gulf States Canners, Inc. *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 215.

No. 80–1839. Davi *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 657 F. 2d 265.

No. 80–1840. SASSO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 657 F. 2d 265.

No. 80–1847. WILSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 636 F. 2d 1228.

No. 80–1851. ALMAGUER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 1265.

No. 80–1856. MENGRONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 657 F. 2d 265.

No. 80–1865. ABESS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 270.

No. 80–6275. TURNER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–6315. HAYNES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 89 Ill. App. 3d 231, 411 N. E. 2d 876.

No. 80–6374. ADLER *v.* OHIO. Ct. App. Ohio, Wood County. Certiorari denied.

No. 80–6472. SINGLETON *v.* STATE BAR OF WISCONSIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 76.

No. 80–6474. DAVIS *v.* MCALLISTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 631 F. 2d 1256.

No. 80–6475. AYERS *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 642 F. 2d 447.

No. 80–6477. HIGHT *v.* BALKCOM, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 1232.

No. 80–6485. SINGLETON *v.* STATE BAR OF WISCONSIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 76.

No. 80-6488. NASSRALLA *v.* CIVIL SERVICE BOARD, CITY OF SAN BERNARDINO, CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 80-6489. MAURER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80-6490. HANEY *v.* ROSE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 1055.

No. 80-6492. STEWART *v.* GEORGIA ET AL. Sup. Ct. Ga. Certiorari denied.

No. 80-6493. SNEAD ET AL. *v.* KIRKLAND ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 443.

No. 80-6496. JARVIS *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 1227.

No. 80-6498. YOUNG *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 610 S. W. 2d 8.

No. 80-6499. ARCHER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 607 S. W. 2d 539.

No. 80-6500. LEWIS *v.* LOUISIANA STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 577.

No. 80-6505. STEVENSON *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1219.

No. 80-6507. BELL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 80-6510. SMITH *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 618 S. W. 2d 603.

No. 80-6526. YOUNG *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 80–6554. JOHNSON *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 1231.

No. 80–6560. DI CARLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 173.

No. 80–6564. MARQUEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–6599. GORDON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 886.

No. 80–6606. ROBERTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 638 F. 2d 134.

No. 80–6612. LOPEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 59.

No. 80–6613. CALLWOOD *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 441.

No. 80–6629. HERRERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 1231.

No. 80–6649. FRANCIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 641 F. 2d 877.

No. 79–2034. BLUM, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK *v.* CALDWELL ET AL. C. A. 2d Cir. Motion of respondents McCullough, Richmond, Grant, Barnett, Perito, Landers, and Maniccia for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 621 F. 2d 491.

No. 80–1627. FLORIDA *v.* BUSCH. Dist. Ct. App. Fla., 1st Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 392 So. 2d 272.

No. 80–1670. DEPARTMENT OF AGRICULTURE OF GEORGIA ET AL. *v.* SMITH. C. A. 5th Cir. Certiorari denied. JUSTICE STEWART and JUSTICE BLACKMUN would grant certiorari. Reported below: 630 F. 2d 1081.

No. 80–1686. MEAD CORP. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ET AL. (ADAMS EXTRACT CO. ET AL., REAL PARTIES IN INTEREST). C. A. 5th Cir. Certiorari denied. JUSTICE STEWART and JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 80–6483. MATTISON *v.* SEARS, ROEBUCK & CO. C. A. 10th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition.

No. 80–6506. FLEMING *v.* AUSTIN, WARDEN. Sup. Ct. Ga. Certiorari denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 80–1381. CISSNA ET UX. *v.* AMMAN ET AL., 450 U. S. 1042;

No. 80–1415. MURPHY *v.* EAGEN, JUSTICE, PENNSYLVANIA SUPREME COURT, ET AL., 451 U. S. 910;

No. 80–1473. STEVENSON *v.* STEVENSON, 451 U. S. 911;

No. 80–5757. DAVIS *v.* GEORGIA, 451 U. S. 921;

No. 80–6211. MAKARA *v.* BRITISH PETROLEUM CORP., 451 U. S. 914;

No. 80–6300. JOHN *v.* JOSEPH, 451 U. S. 941; and

No. 80–6428. HEIMERLE *v.* UNITED STATES, 451 U. S. 942. Petitions for rehearing denied.

No. 79–1128. MONTANA ET AL. *v.* UNITED STATES ET AL., 450 U. S. 544. Motion of respondent United States for modification of opinion denied. Motion of National Tribal Chairmen's Association et al. for leave to file a brief as *amici curiae* granted. Petition for rehearing denied.

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Appeals Dismissed

No. 80–1716. LABOVE ET UX. *v.* CITY OF GROVES. Appeal from Sup. Ct. Tex. dismissed for want of jurisdiction. Reported below: 608 S. W. 2d 162.

No. 80–6515. CROSS *v.* SUNDIN ET AL. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 221 Va. 232, 269 S. E. 2d 787.

No. 80–6541. PRENZLER *v.* STATE BAR OF ARIZONA. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this case.

Vacated and Remanded on Appeal

No. 80–1509. THONE, GOVERNOR OF NEBRASKA, ET AL. *v.* WOMENS SERVICES, P. C., ET AL. Appeal from C. A. 8th Cir. Judgment vacated and case remanded for further consideration in light of *H. L.* v. *Matheson*, 450 U. S. 398 (1981). JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN dissent and would affirm the judgment. Reported below: 636 F. 2d 206.

Certiorari Granted—Vacated and Remanded

No. 80–526. MURRAY *v.* BRANCH MOTOR EXPRESS CO. ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Clay-*

ton v. *Automobile Workers*, 451 U. S. 679 (1981). Reported below: 622 F. 2d 585.

No. 80–1166. MISSOURI *v.* SINCLAIR. Ct. App. Mo., Southern Dist. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Albernaz* v. *United States*, 450 U. S. 333 (1981). Reported below: 606 S. W. 2d 271.

No. 80–1561. MISSOURI *v.* LOWERY. Ct. App. Mo., Eastern Dist. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Albernaz* v. *United States*, 450 U. S. 333 (1981). Reported below: 608 S. W. 2d 445.

No. 80–1741. GLITSCH, INC. *v.* JONES. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981). Reported below: 634 F. 2d 1353.

Miscellaneous Orders

No. A–918. BECKER ET AL. *v.* UNITED STATES ET AL. D. C. E. D. Cal. The temporary stay heretofore entered by JUSTICE REHNQUIST is continued pending further order of the Court.

No. A–923. DONOHUE *v.* UNITED STATES. D. C. Md. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–229. IN RE DISBARMENT OF LISNER. Disbarment entered. [For earlier order herein, see 450 U. S. 1038.]

No. D–230. IN RE DISBARMENT OF CONROY. Disbarment entered. [For earlier order herein, see 450 U. S. 1038.]

No. 84, Orig. UNITED STATES *v.* ALASKA. Motion of Inupiat Community of the Arctic Slope for leave to intervene referred to the Special Master. [For earlier order herein, see, *e. g.*, 445 U. S. 914.]

No. 80–419. ARIZONA *v.* MARICOPA COUNTY MEDICAL SOCIETY ET AL. C. A. 9th Cir. [Certiorari granted, 450 U. S. 979.] Motion of the Solicitor General as *amicus curiae* for divided argument and for additional time for oral argument granted, and 10 additional minutes allotted for that purpose. Respondents also allotted an additional 10 minutes for oral argument.

No. 80–518. U. S. INDUSTRIES/FEDERAL SHEET METAL, INC., ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. D. C. Cir. [Certiorari granted, 450 U. S. 979.] Motion of American Insurance Association for leave to file a brief as *amicus curiae* granted.

No. 80–689. WIDMAR ET AL. *v.* VINCENT ET AL. C. A. 8th Cir. [Certiorari granted, 450 U. S. 909.] Motions for leave to file briefs as *amici curiae* by the following are granted: United States Catholic Conference; Bible Study; Center for Constitutional Studies et al.; Regents of the University of California; National Association of Evangelicals; and Association for the Coordination of University Religious Affairs.

No. 80–847. COMMON CAUSE ET AL. *v.* SCHMITT ET AL.; and

No. 80–1067. FEDERAL ELECTION COMMISSION *v.* AMERICANS FOR CHANGE ET AL. D. C. D. C. [Probable jurisdiction noted, 450 U. S. 908.] Motions of appellants for divided argument and for additional time for oral argument granted. A total of one and one-half hours is allotted for oral argument to be divided as follows: 25 minutes for Federal Election Commission; 20 minutes for Common Cause et al.; and 45 minutes for appellees.

No. 80–846. Rose, Warden *v.* Lundy. C. A. 6th Cir. [Certiorari granted, 450 U. S. 910.] Motion of William M. Leech, Jr., Attorney General of Tennessee, to permit John C. Zimmermann, Esquire, to present oral argument *pro hac vice* granted.

No. 80–1575. Craig et al. *v.* Bickel et al. Appeal from Sup. Ct. Mich. Motion of appellants to expedite consideration of the appeal denied.

No. 80–1777. David Orgell, Inc. *v.* Josiah Wedgwood & Sons, Inc., et al. C. A. 9th Cir.; and

No. 80–1829. Austin, State Attorney, Fourth Judicial Circuit of Florida, et al. *v.* Roberts et al. C. A. 5th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 80–6439. In re McCrary. Petition for writ of mandamus denied.

Certiorari Granted

No. 80–1240. Franzen, Corrections Director *v.* Williams et al. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 633 F. 2d 71.

Certiorari Denied. (See also Nos. 80–6515 and 80–6541, *supra.*)

No. 80–1254. Michigan *v.* Smith. Ct. App. Mich. Certiorari denied. Reported below: 89 Mich. App. 478, 280 N. W. 2d 862.

No. 80–1379. Louisiana Department of Labor, Office of Employment Security *v.* Roman Catholic Church of the Archdiocese of New Orleans et al. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 387 So. 2d 1248.

No. 80–1300. LOUISIANA DEPARTMENT OF HIGHWAYS ET AL. *v.* CRADOR, EXECUTRIX. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 1227.

No. 80–1356. RHOADES ET AL. *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 270 Ark. 962, 607 S. W. 2d 76.

No. 80–1419. HAMILTON *v.* STOVER. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1217.

No. 80–1502. FISHMAN ET AL. *v.* TEACHERS' RETIREMENT SYSTEM OF ILLINOIS ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 86 Ill. App. 3d 649, 408 N. E. 2d 113.

No. 80–1525. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY *v.* GENERAL RAILWAY SIGNAL CO. C. A. D. C. Cir. Certiorari denied. Reported below: 214 U. S. App. D. C. 170, 664 F. 2d 296.

No. 80–1544. BLUE GRASS PROVISION CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1127.

No. 80–1547. ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 766.

No. 80–1563. HOWARD TRUCKING CO., INC., ET AL. *v.* BOUDLOCHE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 1346.

No. 80–1569. JOHNSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–1579. KURZ-KASCH, INC. *v.* METAL POLISHERS, BUFFERS, PLATERS & ALLIED WORKERS INTERNATIONAL UNION, AFL–CIO, LOCAL 11, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 452.

No. 80–1600. HOLMES *v.* UNION GOSPEL PRESS ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 64 Ohio St. 2d 187, 414 N. E. 2d 415.

No. 80–1629. NATIONAL LABOR RELATIONS BOARD *v.* MANHATTAN CORP., MANHATTAN GUEST HOUSE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 53.

No. 80–1642. ROBINSON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 635 F. 2d 363.

No. 80–1658. JACOBS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 639 F. 2d 770.

No. 80–1698. BLOCH *v.* BLOCH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 771.

No. 80–1711. STRUTHERS WELLS CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 636 F. 2d 1210.

No. 80–1715. KUHN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 17.

No. 80–1717. READING INDUSTRIES, INC. *v.* KENNECOTT COPPER CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 631 F. 2d 10.

No. 80–1720. PEOPLE VERSUS PORN (PROFIT OF RICHARD NIXON) ET AL. *v.* NIXON. C. A. 9th Cir. Certiorari denied. Reported below: 634 F. 2d 635.

No. 80–1721. PEEK, DISTRICT ATTORNEY, STONE MOUNTAIN JUDICIAL CIRCUIT *v.* FITZGERALD ET UX. C. A. 5th Cir. Certiorari denied. Reported below: 636 F. 2d 943.

No. 80–1728. YEOHAM ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 635 F. 2d 391.

No. 80–1742. BALTIMORE & OHIO RAILROAD CO. *v.* R. J. DICKEY CO., INC. C. A. 3d Cir. Certiorari denied. Reported below: 636 F. 2d 1207.

No. 80–1753. TEXTRON, INC. *v.* CICCONE. C. A. 1st Cir. Certiorari denied. Reported below: 651 F. 2d 1.

No. 80–1757. MITAN *v.* ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 76.

No. 80–1773. AUFIERO *v.* CLARKE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 639 F. 2d 49.

No. 80–1820. MARCELLO *v.* DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW ORLEANS, LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 964.

No. 80–1825. GRACE ET AL. *v.* BUTTERWORTH, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 635 F. 2d 1.

No. 80–1881. RUSH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 666 F. 2d 10.

No. 80–1898. CROFT METALS, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 635 F. 2d 492.

No. 80–1915. DELAGARZA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 650 F. 2d 1166.

No. 80–6181. BISHOP *v.* MAZURKIEWICZ ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 634 F. 2d 724.

No. 80–6208. CARTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 450.

No. 80–6264. AINSWORTH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 80–6270. LAFFITTE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 80–6311. COLANDER *v.* SHIELDS. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 877.

No. 80–6336. RIOS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 637 F. 2d 728.

No. 80–6378. OBREGON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 423 A. 2d 200.

No. 80–6379. BUSIC *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 940.

No. 80–6389. COLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 866.

No. 80–6403. SAUNDERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 641 F. 2d 659.

No. 80–6408. SNYDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 883.

No. 80–6464. THOMAS *v.* HILL ET AL. C. A. 9th Cir. Certiorari denied.

No. 80–6469. FORD ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 882.

No. 80–6471. LOWE *v.* PARKER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 639 F. 2d 788.

No. 80–6511. LEVARIO *v.* STATE BAR OF CALIFORNIA, COMMITTEE OF BAR EXAMINERS. Sup. Ct. Cal. Certiorari denied.

No. 80–6512. KINNEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 638 F. 2d 941.

No. 80–6513. NEUMANN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 51 N. Y. 2d 658, 417 N. E. 2d 69.

No. 80–6524. MILLER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 79 App. Div. 2d 687, 434 N. Y. S. 2d 36.

No. 80–6525. HINKLE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. ci.

No. 80–6530. TILLEY *v.* HILLIARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 783.

No. 80–6534. SILO *v.* KELLY, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–6535. LAWSON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 412 N. E. 2d 759.

No. 80–6536. MCCLAIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 643 F. 2d 911.

No. 80–6538. HIGGINS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 492 Pa. 343, 424 A. 2d 1222.

No. 80–6539. SYKES *v.* STEPHENS, ATTORNEY GENERAL OF KENTUCKY. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 59.

No. 80–6542. COLLIER *v.* LOS ANGELES SOUTHWEST COLLEGE. C. A. 9th Cir. Certiorari denied.

No. 80–6590. LANIER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 647 F. 2d 167.

No. 80–6597. DAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 640 F. 2d 384.

No. 80–6611. DUCKETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 783.

No. 80–6627. J. B. *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied.

No. 80–6634. BROUSSARD *v.* LIPPMAN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 643 F. 2d 1131.

No. 80–6640. KENNY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 645 F. 2d 1323.

No. 80–6660. RENNIE ET AL. *v.* KLEIN, COMMISSIONER, DEPARTMENT OF HUMAN SERVICES OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari before judgment denied.

No. 80–6663. RUBEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 174.

No. 80–6672. SONDERUP *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 639 F. 2d 294.

No. 80–1099. ALABAMA *v.* BATTLES. Ct. Crim. App. Ala. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 389 So. 2d 957.

CHIEF JUSTICE BURGER, with whom JUSTICE BLACKMUN and JUSTICE REHNQUIST join, dissenting.

I

On September 19, 1979, the Governor of Florida sent to the State of Alabama a demand for respondent's extradition. The demand consisted of four documents: (a) a verified information; (b) an affidavit; (c) a warrant for respondent's arrest; and (d) a formal request for extradition.

The information, dated August 20, 1979, charges that on or about July 1, 1979, respondent was present in Bay County, Fla., and obtained an automobile from one Stimmett by issuing a personal check for $1,300 drawn upon a closed account at an Alabama bank. After describing this transaction in detail and alleging that respondent acted with knowledge that there were insufficient funds on deposit to cover his check, the information charges that respondent thereby

committed two felonies: (a) obtaining a motor vehicle with intent to defraud and (b) passing a worthless check.[1] The information is verified by an oath in which the prosecutor swears that the charges "are based upon facts that have been sworn to as true, and which, if true, would constitute the offense therein charged," and also that the information "is filed in good faith."

The affidavit, sworn to before a Magistrate on August 31, 1979, avers: the affiant is an investigator with the office of the State Attorney in Panama City, Bay County, Fla.; the affiant has investigated the offense; and "during the course of my investigation, I obtained the following facts," at which point the affidavit substantially repeats the facts charged in each count of the information.

The arrest warrant, pursuant to Florida law, was automatically issued by the Clerk of the Circuit Court of Bay County upon the filing of the verified information.

The request for extradition is signed by the Governor and Secretary of State of Florida and bears the seal of the State of Florida. It certifies that respondent "was present in [Florida] at the time of the commission of said crime and thereafter fled from the justice of this State"; that respondent has taken refuge in Alabama; and that the other extradition documents are "authentic and duly authenticated in accordance with the laws of the State of Florida."

On October 11, 1979, the Governor of Alabama ordered extradition "in obedience to the Constitution and the laws of the United States and the laws of the State of Alabama" and issued a rendition warrant. Pursuant to that warrant, Alabama placed respondent under arrest.

Respondent immediately sought habeas corpus in the Circuit Court of Etowah County, Ala. At the habeas hear-

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[1] Each of these offenses is punishable as a felony in the third degree, subject to a fine of up to $5,000 and a term of imprisonment not exceeding five years. Fla. Stat. §§ 817.52, 832.05; and §§ 775.082 (3)(d), 775.083 (1)(c) (1979).

ing, respondent admitted that he was the person sought in the extradition papers; that he had traveled to Florida on the date in question; that he had issued the check to Stimmett in return for the car; that there had not been sufficient funds in the account at the time he issued the check; that he had taken the car to Alabama and sold it; and that he still owed the money for which his check was tendered. Tr. 5–7.[2] Respondent argued, however, that the "certification" of the Florida extradition documents failed to comply with the Alabama extradition statute. The Circuit Court denied the writ.

The Alabama Court of Criminal Appeals reversed. 389 So. 2d 957 (1980). That court reasoned that the papers submitted by the Florida authorities did not meet procedural requirements purportedly implied by language of the Alabama extradition statute. This statute (Uniform Criminal Extradition Act) provides:

> "No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing and accompanied by a copy of an indictment found, or by an information supported by affidavit, in the state having jurisdiction of the crime or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereon. The indictment, information or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state, and the copy must be authenticated by the executive authority making the demand, which shall be prima facie evidence of its truth." Ala. Code § 15–9–31 (1975).

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[2] Respondent testified that the account "wasn't supposed to be a closed bank account" at the time he wrote the check and that he had told Stimmett that there were insufficient funds in the account and that he would have to return to Alabama and put more money in the bank. Tr. 6, 8.

The statute also requires in pertinent part that the documents supporting the demand must show that the accused

> "is lawfully charged by indictment or by an information filed by a prosecuting officer and supported by affidavit to the facts, or by affidavit made before a magistrate in that state, with having committed a crime under the laws of that state . . . ." Ala. Code § 15–9–33 (1975).

The Court of Criminal Appeals interpreted these statutory provisions to require that an affidavit, based upon personal knowledge, must coincide with and be attached to the information. The court concluded that Florida had failed to satisfy the Alabama statute because the affidavit "is not sufficient in law to support the information which is dated some eleven days earlier," because it "is not attached" to the information, and because "there is no showing of any personal knowledge on [the affiant's] part of the source, or reliability of the facts asserted in the affidavit." 389 So. 2d, at 960. It is uncontroverted that Florida law imposes none of these requirements,[3] and that under Florida law, respondent will be accorded a nonadversary probable-cause hearing within 72 hours of the time Florida takes custody.[4]

II

Article IV, § 2, cl. 2, of the United States Constitution provides:

> "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered

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[3] See Fla. Rule Crim. Proc. 3.140 (g); *State* v. *Bacon*, 385 So. 2d 1160, 1163 (Fla. App. 1980).

[4] See Fla. Rule Crim. Proc. 3.131 (a). This Rule allows a finding of probable cause to be based upon "sworn complaint, affidavit, deposition under oath, or, if necessary, upon testimony under oath properly recorded."

> up, to be removed to the State having Jurisdiction of the Crime."

The Extradition Clause expressly turns on the existence of a "charge," not on what types or quantities of proof support the charge. It mandates that extradition shall be "a summary and mandatory executive proceeding." *Michigan* v. *Doran*, 439 U. S. 282, 288 (1978). The Clause does not permit the asylum state's courts to weigh the evidence upon which the "Demand of the executive Authority" of a sister state is based. Instead, the asylum state may consider only

> "'(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive.'" *Pacileo* v. *Walker*, 449 U. S. 86, 87 (1980), quoting *Doran*, *supra*, at 289.

The decision of the Court of Criminal Appeals plainly exceeds the permissible scope of determining "whether the extradition documents on their face are in order" and "whether the defendant has been charged with a crime in the demanding state." Under the guise of simply considering whether the documents were facially in order, the Alabama court actually imposed a requirement that Florida's documents must satisfy the Alabama court's particular view of probable cause to arrest. Although *Doran* involved a situation in which the demanding state had already made a judicial determination that probable cause existed, see 439 U. S., at 284, I perceive no material difference between that case and the present case. In either situation, an asylum state must look to the "charge"; it is not free to substitute its own judgment for the probable-cause determination to be made by the demanding state's courts. "'To allow plenary review in the asylum state of issues that can be fully litigated in the charging state would defeat the plain purposes of the summary and man-

datory procedures authorized by Art. IV, § 2.'" *Pacileo* v. *Walker*, *supra*, at 88, quoting *Doran*, *supra*, at 290.

Florida's demand was supported by a verified information charging respondent with felonies allegedly committed by him while he was present in Florida, an arrest warrant, and the affidavit made before the Magistrate. These documents more than satisfied Florida requirements for the commencement of a prosecution, and respondent makes no argument that those requirements are unconstitutional. Although we would have no occasion in this case to decide whether Alabama could constitutionally require all of these papers,[5] it is certain that Alabama was entitled to no more. In overturning an order of the Governor of Alabama which expressly rested on the United States Constitution and which was prima facie evidence "that the constitutional and statutory requirements have been met," *Doran*, *supra*, at 289, the Alabama court based its decision on a strained view of the relevant law. In *Doran*, we took pains to emphasize that the purpose of the Extradition Clause "was to preclude any state from becoming a sanctuary for fugitives from justice of another state and thus 'balkanize' the administration of criminal justice among the several states." 439 U. S., at 287.

The papers submitted by Florida plainly show that respondent is charged with a crime in Florida and that he is a fugitive from justice. Notwithstanding our heavy workload, the conflict between this decision and *Doran* is so obvious as to warrant a grant of certiorari and summary reversal of the judgment.[6]

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[5] In particular, we need not decide whether an asylum state may constitutionally insist that the demanding state must, in every case in which prosecution is initiated by information, produce some sort of affidavit in addition to a verified information.

[6] The decision of the Alabama court is particularly egregious when viewed in light of respondent's testimony at the habeas hearing in the Alabama Circuit Court. Respondent expressly admitted that he was the person named in the extradition papers, that he had gone to Florida and

No. 80–1123. SAYE ET AL. *v.* WILLIAMS. C. A. 5th Cir. Certiorari denied. Reported below: 629 F. 2d 993.

JUSTICE REHNQUIST, dissenting.

Respondent was an officer in a university police department. Over the objections of petitioners, his superiors, respondent desired to run for the office of County Sheriff. The chief of the local police force, Chief Brown, also desired to run for that office. Chief Brown was involved in an accident, and respondent approved an accident report which stated among other things that Brown had been drinking. The next morning petitioners, at the request of Chief Brown, had the accident report changed so as to read "Not known if drinking." Respondent objected to the modified accident report, and disclosed these events to his father, who in turn leaked the original and altered accident reports to the press. When petitioners learned of the leak, they fired respondent. Respondent subsequently filed suit alleging that he had been fired for engaging in protected First Amendment activity.

After a jury trial, respondent was awarded compensatory and punitive damages against both petitioners. Relying on the so-called *Pickering* defenses, see *Pickering* v. *Board of Education*, 391 U. S. 563 (1968), petitioners had sought to defend the discharge on the grounds that respondent, by leaking confidential police material for his own political ends, had destroyed a harmonious working relationship with his superiors. Petitioners also contended that they were entitled to "official immunity" from damages, in that they had in good faith discharged respondent for violating the department's policy against disclosing confidential police investigative reports. See *Wood* v. *Strickland*, 420 U. S. 308 (1975);

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committed the *actus reus* alleged, and that he had returned to Alabama after doing so. In other words, with the sole exception of state of mind, respondent admitted every element of the offenses charged, and he also admitted having crossed the state line afterward.

Scheuer v. *Rhodes*, 416 U. S. 232 (1974). The District Court, however, held that evidence of these defenses was inadmissible into evidence, and it declined to instruct the jury as to "qualified or good-faith" immunity.

The Court of Appeals for the Fifth Circuit affirmed. *Williams* v. *Board of Regents of the University System of Georgia*, 629 F. 2d 993. It first held that evidence of the confidentiality policy, which went directly to the issue of official immunity, could only be admitted if the policy

> "(1) factually existed, (2) was consistent with other state statutes and regulations, (3) was not vague, (4) did not proscribe protected first amendment speech overbroadly, (5) was communicated to the appellee and (6) was not void as a matter of public policy in its instant application." *Id.*, at 1000 (footnotes omitted).

Although the court conceded that petitioners had shown enough evidence of the existence of a confidentiality policy to establish a jury question, the court held that the other factors were not present, namely, that the confidentiality policy conflicted with state regulations. Because the evidence of the confidentiality policy was inadmissible, the court concluded that there was insufficient evidence to warrant a jury instruction as to the existence of "good-faith" immunity.

It seems to me that the Court of Appeals' six-prong "test" unjustifiably expands the principles announced in such cases as *Wood* and *Scheuer*. In those cases, we held that official immunity is available where there is evidence that the official has a subjective good-faith belief in the lawfulness of his action and where the action is not inconsistent with undisputed and settled law. Accordingly, I believe that the novel test announced by the Court of Appeals warrants review.

The court next rejected petitioners' contention that the District Court erred in refusing to permit petitioners to introduce evidence and to charge the jury as to their *"Pickering*

defenses," based on this Court's decision in *Pickering* v. *Board of Education, supra*. Petitioners argued that they should have been permitted to show the necessity of maintaining discipline in an organization such as a police department and to show how respondent's conduct leads to a breakdown of that discipline. The Court of Appeals disagreed, finding that the District Court correctly found that respondent's First Amendment interests outweighed petitioners' interests in maintaining discipline. 629 F. 2d, at 1003.

I disagree. In *Pickering*, the Court held that whether speech of a public employee is protected depends upon "a balance between the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U. S., at 568. But we also recognized that even accurate public criticism of a superior by a subordinate might warrant dismissal where the relationship between superior and subordinate is of such a nature that public criticism would seriously impair the working relationship between them. *Id.*, at 570, n. 3. As the late Judge Leventhal explained in *Meehan* v. *Macy*, 129 U. S. App. D. C. 217, 230, 392 F. 2d 822, 835 (1968), cited with approval in *Arnett* v. *Kennedy*, 416 U. S. 134, 161–162 (1974):

> "We think it is inherent in the employment relationship as a matter of common sense if not common law that an employee in appellant's circumstances cannot reasonably assert a right to keep his job while at the same time he inveighs against his superiors in public with intemperate and defamatory lampoons. We believe that Meehan cannot fairly claim that discharge following an attack like that presented by this record comes as an unfair surprise or is so unexpected and uncertain as to chill his freedom to engage in appropriate speech." (Footnote omitted.)

In this case, I believe that the Court of Appeals struck the wrong balance. As it itself acknowledged:

> "Viewed in the light most favorable to [petitioners], it was established that the 'leak' of the altered report would irreparably damage the working relationship between [petitioners] and Williams. Although Saye was not Williams' immediate superior, there was frequent communication and necessity for working together. It is clear, therefore, that disharmony would result. Additionally, as [petitioners] argue, discipline is a necessary component of a smoothly-operating police force. Although this necessity of discipline does not rise to the same level as required by the military, see *Parker v. Levy*, 417 U. S. 733 . . . (1974), discipline must be maintained between police officers during periods of active duty." 629 F. 2d, at 1003.

Though the court observed that "disharmony would result," it nevertheless concluded that evidence of "this very real threat of disruption, disharmony and breakdown of discipline" was properly excluded by the trial court, not only as an absolute defense but even as a basis of a good-faith "official immunity." *Ibid.* In my view, the court gave too little weight to the need for maintaining a close working relationship in a quasi-military organization like a police department. And quite unlike the situation in *Pickering*, respondent's actions here called into question the integrity of his immediate superiors with whom he worked daily.

More significantly, I believe that the decision here conflicts with those of other Circuits. In *Sprague* v. *Fitzpatrick*, 546 F. 2d 560 (CA3 1976), cert. denied, 431 U. S. 937 (1977), the court took a much broader view of the *Pickering* defenses than did the court here. It concluded that the public criticism of the District Attorney by his first assistant precluded any future working relationship between the parties and hence was unprotected. See *Clark* v. *Holmes*, 474 F. 2d 928

(CA7 1972), cert. denied, 411 U. S. 972 (1973). Likewise in this case, I believe petitioners should have been permitted to introduce evidence as to the breakdown of a minimally acceptable working relationship between the parties as well as to the maintenance of necessary police department discipline.

Viewed in one context, I can understand why this case is not a particularly attractive candidate for review. Like so many other cases, it involves a number of factual disputes, with conflicting evidence on both sides. Nonetheless, the legal issues presented by the case—whether the trial court erred in refusing to admit into evidence material going to "qualified immunity" and *Pickering* defenses—are sufficiently isolated from the factual controversies so as to make this case a suitable vehicle for review. I would grant certiorari to consider those legal issues.

No. 80–1589. BROWN BOVERI ELECTRIC, INC., SWITCHGEAR SYSTEMS DIVISION *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 638 F. 2d 159.

No. 80–1687. WESTERN UNION TELEGRAPH CO. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition.

No. 80–1667. MANSON *v.* VILLAFANE. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE would grant the writ and summarily reverse the Court of Appeals' judgment. Reported below: 639 F. 2d 770.

No. 80–1764. FLORIDA *v.* MORSMAN. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 394 So. 2d 408.

No. 80–1783. CALIFORNIA *v.* CHADD. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 28 Cal. 3d 739, 621 P. 2d 837.

No. 80–1806. HARRIS, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* BERMUDEZ ET AL. C. A. 2d Cir. Motions of respondents Jose Laureno, Jose Bonilla, and Fernando Bermudez for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 657 F. 2d 262.

No. 80–2035. ELECTRONIC DATA SYSTEMS CORPORATION IRAN *v.* SOCIAL SECURITY ORGANIZATION OF THE GOVERNMENT OF IRAN ET AL. C. A. 5th Cir. Motion of Citibank, N. A., et al. for leave to file a brief as *amici curiae* granted. Motion of petitioner for an expedited briefing schedule and oral argument denied. Certiorari before judgment denied.

No. 80–5693. CRAWFORD *v.* TEXAS. Ct. Crim. App. Tex.;
No. 80–6322. SKILLERN *v.* TEXAS. Ct. Crim. App. Tex.;
No. 80–6345. BULLOCK *v.* MISSISSIPPI. Sup. Ct. Miss.; and
No. 80–6401. YOUNG *v.* ZANT, WARDEN. Super. Ct. Ga., Butts County. Certiorari denied. Reported below: No. 80–5693, 617 S. W. 2d 925; No. 80–6322, 609 S. W. 2d 762; No. 80–6345, 391 So. 2d 601.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 80–660. SILVER SPUR CASINO ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL., 451 U. S. 906. Petition for rehearing denied.

No. 80–1083. BARNEY'S CLUB, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD, 451 U. S. 906;

No. 80–5775. SPRAGGINS *v.* GEORGIA, 451 U. S. 921;

No. 80–5850. BROOKS *v.* GEORGIA, 451 U. S. 921;

No. 80–5918. LEACH *v.* GRECO, WARDEN, ET AL., 451 U. S. 972;

No. 80–5933. HILL *v.* GEORGIA, 451 U. S. 923;

No. 80–5972. RUHL *v.* ALABAMA STATE BAR, 451 U. S. 901;

No. 80–6030. WILLIS *v.* BALKCOM, WARDEN, 451 U. S. 926;

No. 80–6285. WHITELAW *v.* MWP LIMITED PARTNERSHIP, 451 U. S. 916;

No. 80–6327. PIERCE ET AL. *v.* YOCHUM ET AL., 451 U. S. 973; and

No. 80–6330. SEGARRA *v.* SEA-LAND SERVICE OF PUERTO RICO, INC., ET AL., 451 U. S. 973. Petitions for rehearing denied.

No. 80–1360. GENERAL ATOMIC CO. *v.* UNITED NUCLEAR CORP. ET AL., 451 U. S. 901. Petition for rehearing denied. JUSTICE STEWART took no part in the consideration or decision of this petition.

No. 80–5992. HUGHES *v.* HOPPER ET AL., 450 U. S. 933. Motion for leave to file petition for rehearing denied.

JUNE 11, 1981

Certiorari Granted

No. 80–2078. DAMES & MOORE *v.* REGAN, SECRETARY OF THE TREASURY, ET AL. C. A. 9th Cir. Motion of Sperry Corp. et al. for leave to file a brief as *amici curiae* granted. Motion of Bank Markazi Iran for leave to intervene granted. Motion of the Islamic Republic of Iran and the Atomic Energy Organization of the Government of Iran for leave to intervene as respondents granted. Motion of the Solicitor

General to expedite consideration of the petition for writ of certiorari before judgment granted. Certiorari before judgment granted. Request of the Solicitor General to expedite the schedule for briefing and oral argument granted. The parties shall exchange and file opening briefs by 3:00 p.m. on June 19, 1981, and any reply briefs shall be exchanged and filed by 3:00 p.m. on June 23, 1981. Oral argument is set for June 24, 1981, at 10:00 a.m. JUSTICE REHNQUIST dissents.

JUNE 12, 1981

Dismissal Under Rule 53

No. 80–1836. DELAGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 638 F. 2d 1232.

JUNE 15, 1981

Appeals Dismissed

No. 80–1738. CHEN *v.* SUPREME COURT OF NEW JERSEY. Appeal from Sup. Ct. N. J. dismissed for want of jurisdiction. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument.

No. 80–1766. COLUMBUS & SOUTHERN OHIO ELECTRIC CO. *v.* PUBLIC UTILITIES COMMISSION OF OHIO. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 64 Ohio St. 2d 175, 413 N. E. 2d 1208.

No. 80–1769. WESTINGHOUSE BROADCASTING CO., INC. *v.* COMMISSIONER OF REVENUE OF MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. JUSTICE STEWART took no part in the consideration or decision of this case. Reported below: 382 Mass. 354, 416 N. E. 2d 191.

No. 80–1940. LONG *v.* DISTRICT DIRECTOR, INTERNAL REVENUE SERVICE, PHOENIX, ARIZONA. Appeal from C. A. 10th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 80–6576. PRENZLER *v.* SPENCER & SPENCER. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 80–1374. RHODE ISLAND *v.* DEMASI ET AL. Sup. Ct. R. I. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Cortez*, 449 U. S. 411 (1981). JUSTICE BRENNAN, JUSTICE STEWART, JUSTICE WHITE, and JUSTICE MARSHALL dissent. Reported below: — R. I. —, 419 A. 2d 285.

No. 80–1550. UNITED PARCEL SERVICE, INC. *v.* TINSLEY ET AL. C. A. 7th Cir. Motion of respondent Paul E. Tinsley, Jr., for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Clayton* v. *Automobile Workers*, 451 U. S. 679 (1981). JUSTICE STEVENS dissents and would deny certiorari. Reported below: 635 F. 2d 1288.

No. 80–1668. MICHIGAN *v.* PEQUES. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the Supreme Court of Michigan to consider whether its judgment is based upon federal or state constitutional grounds, or both. See *California* v. *Krivda*, 409 U. S. 33 (1972). Reported below: 410 Mich. 894, 304 N. W. 2d 455.

No. 80–6600. WILLIAMS *v.* OHIO. Ct. App. Ohio, Hamilton County. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Edwards* v. *Arizona*, 451 U. S. 477 (1981).

Miscellaneous Orders

No. A–918. BECKER ET AL. *v.* UNITED STATES ET AL. D. C. E. D. Cal. The order heretofore entered on June 8, 1981 [*ante*, p. 912], is vacated and the application for stay is denied.

No. D–226. IN RE DISBARMENT OF KUMAR. Disbarment entered. [For earlier order herein, see 450 U. S. 1037.]

No. D–233. IN RE DISBARMENT OF BARBARA. Disbarment entered. [For earlier order herein, see 451 U. S. 903.]

No. D–242. IN RE DISBARMENT OF CASKEY. It is ordered that William J. Caskey, of West Columbia, S. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 83, Orig. MARYLAND ET AL. *v.* LOUISIANA. Motion of the Special Master for compensation granted, and it is ordered that plaintiffs and intervenor-plaintiffs compensate the Special Master in the total amount of $25,000 and that the defendant compensate the Special Master in the total amount of $25,000. JUSTICE POWELL took no part in the consideration or decision of this motion. [For decree herein, see *ante*, p. 456.]

No. 80–689. WIDMAR ET AL. *v.* VINCENT ET AL. C. A. 8th Cir. [Certiorari granted, 450 U. S. 909.] Motions of Holy Spirit Association for the Unification of World Christianity and National Jewish Commission on Law and Public Affairs for leave to file briefs as *amici curiae* granted.

No. 80–757. NEW YORK MERCANTILE EXCHANGE ET AL. *v.* LEIST ET AL.;

No. 80–895. CLAYTON BROKERAGE CO. OF ST. LOUIS, INC. *v.* LEIST ET AL.; and

No. 80–936. HEINOLD COMMODITIES, INC., ET AL. *v.* LEIST ET AL. C. A. 2d Cir. [Certiorari granted, 450 U. S. 910.] Motion of Sunnyside Eggs, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 80–1070. RIDGWAY ET AL. *v.* RIDGWAY ET AL. Sup. Jud. Ct. Me. [Certiorari granted, 450 U. S. 979.] Motion of the Solicitor General as *amicus curiae* for divided argument and for additional time for oral argument granted, and 10 additional minutes allotted for that purpose. Respondents also allotted an additional 10 minutes for oral argument. Motion of petitioners for divided argument and for additional time for oral argument denied.

No. 80–1350. COMMUNITY COMMUNICATIONS CO., INC. *v.* CITY OF BOULDER, COLORADO, ET AL. C. A. 10th Cir. [Certiorari granted, 450 U. S. 1039.] Motion of Alaska et al. for divided argument in support of petitioner as *amici curiae* granted, and 10 minutes of petitioner's one-half hour allotted for that purpose. Motion of petitioner for additional time for oral argument denied.

No. 80–1727. IN RE BLOCH; and

No. 80–6328. IN RE HEGWOOD. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 80–1749. FEDERAL ENERGY REGULATORY COMMISSION ET AL. *v.* MISSISSIPPI ET AL. Appeal from D. C. S. D. Miss. Motion of Louisiana Public Service Commission for leave to file a brief as *amicus curiae* granted. Probable jurisdiction noted.

No. 80–1934. TEXAS ET AL. *v.* CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN ET AL. Appeal from C. A. 5th Cir. Motion of appellant Texas to expedite consideration of the appeal granted. Motion of appellees Sandra and Maria Cardenas for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted, case consolidated with No. 80–1538, *Plyer, Superintendent, Tyler Independent School District, et al.* v. *Doe, Guardian, et al.* [probable jurisdiction noted, 451 U. S. 968], and a total of one hour allotted for oral argument.

Certiorari Granted

No. 80–1199. AMERICAN TOBACCO CO. ET AL. *v.* PATTERSON ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 634 F. 2d 744.

No. 80–1730. LUGAR *v.* EDMONDSON OIL CO., INC., ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 639 F. 2d 1058.

No. 80–1765. AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC. *v.* HYDROLEVEL CORP. C. A. 2d Cir. Certiorari granted. Reported below: 635 F. 2d 118.

No. 80–1735. FEDERAL BUREAU OF INVESTIGATION ET AL. *v.* ABRAMSON. C. A. D. C. Cir. Certiorari granted. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 212 U. S. App. D. C. 58, 658 F. 2d 806.

No. 80–1781. MCNICHOLS, MAYOR OF DENVER, ET AL. *v.* BALDRIGE, SECRETARY OF COMMERCE, ET AL. C. A. 10th Cir. Motion of the Solicitor General to expedite consideration of the petition for writ of certiorari granted. Upon consideration of the petition for writ of certiorari, certiorari granted. Reported below: 644 F. 2d 844.

Certiorari Denied. (See also Nos. 80–1940 and 80–6576, *supra.*)

No. 79–1061. MAEHREN ET AL. *v.* CITY OF SEATTLE ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 92 Wash. 2d 480, 599 P. 2d 1255.

No. 79–1080. DETROIT POLICE OFFICERS' ASSN. ET AL. *v.* YOUNG, MAYOR OF DETROIT, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 608 F. 2d 671.

No. 80–29. CITY OF ST. LOUIS, MISSOURI, ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 616 F. 2d 350.

No. 80–1010. CURREY ET AL., DBA CURREY & CURREY *v.* CORPORATION COMMISSION OF OKLAHOMA ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 617 P. 2d 177.

No. 80–1518. DAVIS *v.* MAINE ENDWELL CENTRAL SCHOOL DISTRICT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 560.

No. 80–1541. EAST CARROLL PARISH POLICE JURY ET AL. *v.* MARSHALL. C. A. 5th Cir. Certiorari denied. Reported below: 629 F. 2d 425.

No. 80–1609. PROLERIZED NEW ENGLAND CO. ET AL. *v.* BENEFITS REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 637 F. 2d 30.

No. 80–1615. BENDETTI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 444.

No. 80–1616. TAKIZAWA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 563.

No. 80–1619. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 453.

No. 80–1621. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 224.

No. 80–1631. GIRESI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 642 F. 2d 444.

No. 80–1677. GREGORY *v.* WHITE, ATTORNEY GENERAL OF TEXAS, ET AL. Ct. Civ. App. Tex., 4th Sup. Jud. Dist. Certiorari denied. Reported below: 604 S. W. 2d 402.

No. 80–1696. HARING *v.* REGAN, SECRETARY OF THE TREASURY. C. A. D. C. Cir. Certiorari denied.

No. 80–1708. DOW CHEMICAL CO. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 635 F. 2d 559.

No. 80–1712. SOUTH DAKOTA ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 636 F. 2d 241.

No. 80–1722. SHARROW *v.* HOLTZMAN. C. A. 2d Cir. Certiorari denied. Reported below: 646 F. 2d 562.

No. 80–1726. BRICE-NASH *v.* BRICE-NASH. Ct. App. Kan. Certiorari denied. Reported below: 5 Kan. App. 2d 332, 615 P. 2d 836.

No. 80–1734. MARGOLES *v.* TORMEY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 643 F. 2d 1292.

No. 80–1736. LAFARGUE *v.* SUPREME COURT OF LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 634 F. 2d 315.

No. 80–1739. STELLY *v.* ATLANTIC PACIFIC MARINE CORP. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 246.

No. 80–1743. CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK ET AL. *v.* GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 630 F. 2d 79.

No. 80–1747. BETHLEHEM STEEL CORP. ET AL. *v.* GRANT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 635 F. 2d 1007.

No. 80–1750. 31.72 ACRES OF LAND ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 644 F. 2d 887.

No. 80–1754. COLLINS ET AL. *v.* JOHNSTON ET AL.; and
No. 80–1755. FULK ET AL. *v.* JOHNSTON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 636 F. 2d 1213.

No. 80–1760. BRUDER *v.* TEXAS. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. Reported below: 601 S. W. 2d 102.

No. 80–1767. STUMBO *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 612 S. W. 2d 137.

No. 80–1768. LANCI *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–1774. INDEPENDENT PARTY OF GEORGIA *v.* AMERICAN PARTY OF GEORGIA ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 247 Ga. 3, 275 S. E. 2d 657.

No. 80–1779. ELLIS *v.* ELLIS ET AL. Ct. App. Ky. Certiorari denied. Reported below: 612 S. W. 2d 747.

No. 80–1786. BROWN *v.* LOUISIANA, THROUGH THE DEPARTMENT OF PUBLIC SAFETY, DIVISION OF LOUISIANA STATE POLICE. Sup. Ct. La. Certiorari denied. Reported below: 392 So. 2d 415.

No. 80–1790. LAKE CHARLES AMERICAN PRESS ET AL. *v.* McHALE. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 390 So. 2d 556.

No. 80–1793. WATSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 398 So. 2d 320.

No. 80–1809. GUZZARDO *v.* BENGSTON, SHERIFF, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 643 F. 2d 1300.

No. 80–1814. CITY OF CINCINNATI *v.* JONES ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 80–1815. CASTRO *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD Co. Sup. Ct. Ill. Certiorari denied. Reported below: 83 Ill. 2d 358, 415 N. E. 2d 365.

No. 80–1854. BENJAMIN *v.* MACCHIAROLA, CHANCELLOR, BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 652 F. 2d 53.

No. 80–1869. INTERNATIONAL ORDER OF JOB'S DAUGHTERS *v.* LINDEBURG & Co. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 912.

No. 80–1878. BURGDORF *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 639 F. 2d 787.

No. 80–1921. DISTILLERY, RECTIFYING, WINE & ALLIED WORKERS INTERNATIONAL UNION OF AMERICA, LOCAL UNION 38, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 642 F. 2d 185.

No. 80–1941. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 58.

No. 80–6342. HAYES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 640 F. 2d 280.

No. 80-6473. BLACK *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 78 App. Div. 2d 778, 432 N. Y. S. 2d 974.

No. 80-6480. WEDRA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 652 F. 2d 55.

No. 80-6482. FURMAN *v.* UNITED STATES; and
No. 80-6651. SIMPSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 647 F. 2d 163.

No. 80-6547. CHILDS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 47 Md. App. 739.

No. 80-6551. RUCKER *v.* CITY OF ST. LOUIS ET AL. C. A. 8th Cir. Certiorari denied.

No. 80-6556. THORNE *v.* WARDEN, VIRGINIA STATE PENITENTIARY. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. cli.

No. 80-6557. ROBERTS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 640 F. 2d 225.

No. 80-6559. JOHNSON *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 183 Conn. 148, 438 A. 2d 851.

No. 80-6561. BROWN *v.* MARYLAND. Ct. App. Md. Certiorari denied.

No. 80-6567. WEHRLI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 637 F. 2d 408.

No. 80-6569. HAMPTON *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 80-6570. TAYLOR *v.* HARRIS, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 640 F. 2d 1.

No. 80-6574. TYLER *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 635 F. 2d 752.

No. 80–6575. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 90 Ill. App. 3d 524, 413 N. E. 2d 60.

No. 80–6577. CURRY *v.* STATE BAR OF WISCONSIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 2d 77.

No. 80–6588. EVANS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 635 F. 2d 1124.

No. 80–6592. ROSS *v.* BROWN, ATTORNEY GENERAL OF OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 80–6598. ROSS *v.* DENTON. C. A. 6th Cir. Certiorari denied.

No. 80–6617. WHYTE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 80–6630. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 1231.

No. 80–6648. STEFFEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 641 F. 2d 591.

No. 80–6669. WEEKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 638 F. 2d 1232.

No. 80–6679. CORBITT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 659 F. 2d 1071.

No. 80–6690. DAVIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 649 F. 2d 858.

No. 80–6695. BENTLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 645 F. 2d 70.

No. 80–6706. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 645 F. 2d 599.

No. 80–1474. WINSTON, SHERIFF, ET AL. *v.* MOORE. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 639 F. 2d 781.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE STEWART join, dissenting.

The respondent was charged with feloniously breaking and entering with intent to commit larceny, and was tried by the Circuit Court of the city of Richmond, Va., on March 10, 1980. At approximately 4:30 p.m., the presentation of evidence and arguments of counsel having been completed, the jury retired to deliberate. At approximately 6 p.m., the jury recessed for the evening. The next morning the trial court gave the jury its version of an "Allen" charge because it sensed that the jury was having difficulty reaching a verdict. The jury again began deliberating, but after a little less than an hour the foreman notified the trial court that the jury had not been able to reach a verdict. The court then excused the jury and declared a mistrial, all without objection from the respondent. At the same time, the court set the case down for retrial the following month, on April 16, 1980.

On April 15, 1980, the trial court denied respondent's motion to dismiss the indictment on the ground that a retrial would violate the Double Jeopardy Clause of the Fifth Amendment. Respondent sought the same relief from the Supreme Court of Virginia, which was summarily denied on April 16, 1980. App. to Pet. for Cert. 6a. Respondent then filed a federal habeas petition in the Eastern District of Virginia, likewise seeking to enjoin a retrial. Respondent contended that the trial court erred when it declared a mistrial at the March 10, 1980, trial because there was an insufficient showing of "manifest necessity," as required by this Court's ruling in *United States* v. *Perez*, 9 Wheat. 579 (1824). On April 17, 1980, the District Court held a hearing, apparently on the basis of sworn allegations and responses, see App. to

Pet. for Cert. 6a, and issued a writ of habeas corpus directing that respondent "shall be free from any further jeopardy on the charges set forth in the indictment against him set forth in the record in this case." *Id.*, at 8a. This determination was in turn affirmed on the basis of the "reasons adequately stated by the district court" by a divided Court of Appeals on December 18, 1980. 639 F. 2d 781 (CA4).

The reasoning of the District Court seems to have been that the jury had deliberated for a relatively short period of time: approximately 1½ hours on March 10th, and approximately an hour the following day. The state judge, however, had given the jury his version of an "Allen" charge before they commenced deliberations on the second day, and the District Court in its findings of fact and conclusions of law stated that "[t]here is, of course, no magic number of hours." App. to Pet. for Cert. 7a. The second critical flaw which the federal habeas court found in the state-court proceedings was that the foreman of the jury had not specifically informed the judge that the jury was deadlocked, but instead simply stated "the jurors have not been able to reach a verdict." Thereafter, the trial judge failed to inquire of the jury as a whole. *Ibid.* The federal habeas judge explained: "I think that such an inquiry by the court is required by the law, and in the absence of such an inquiry there is no record which would support a finding that a mistrial was manifestly necessary." *Id.*, at 8a.

Certainly the "law" upon which the federal habeas judge relied is not law which has emanated from this Court. We have recognized that the determination of "manifest necessity" is one which a trial court is uniquely capable of making, and said as much in *United States* v. *Perez*, *supra*:

> "We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opin-

> ion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . . . But, after all, they [the courts] have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office." *Id.*, at 580.

Over a century later, this Court noted in a somewhat different context:

> "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." *Gori* v. *United States*, 367 U. S. 364, 368 (1961).

The classical case of "manifest necessity" in this Court, and so far as I know in other court systems, has been the case of the "hung jury." The federal habeas court gave a tip of its hat to the *Perez* case, went on to state that "this question of manifest necessity has been interpreted by the Third Circuit in *Rusoe* and in *Webb*," App. to Pet. for Cert. 7a, and the remainder of its two-page opinion seems to consist of the federal judge's own opinion of what the law of double jeopardy should be.

I know of no case in this Court imposing on a trial judge a

requirement that each individual juror be interrogated as to the possibility of reaching a verdict before a mistrial is declared, nor do I know of a single case from this Court which has ever overturned a trial court's declaration of a mistrial after a jury was unable to reach a verdict on the ground that the "manifest necessity" standard had not been met. This Court reiterated in *Wade* v. *Hunter*, 336 U. S. 684, 692 (1949), what it had stated in *Perez*, that "the sound discretion of a presiding judge should be accepted as to the necessity of discontinuing a trial." And in our most recent foray into the area of "manifest necessity," *Arizona* v. *Washington*, 434 U. S. 497, 506 (1978), we stated that these words did not "describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge."

In sum, I am reluctantly led to the conclusion that the District Court did one of two things in order to grant the relief that it did, and that either of them merit review by this Court. Either it simply "second-guessed" the state trial judge as to whether this particular jury could, after further deliberation, reach a verdict, or it created a principle of law that has never been sanctioned by this Court to the effect that a trial judge must interrogate each juror as to the possibility of reaching a verdict before it may declare a mistrial because the jury has "hung." Either one of these actions, with their concomitant affirmance by the Court of Appeals, merits plenary review here.

In my view, the determination of "manifest necessity" is one uniquely vested in the discretion of a trial judge, and particularly should not be subject to attack by a habeas action after trial counsel had failed to object to the declaration of a mistrial. Accordingly, I dissent from the denial of the petition for a writ of certiorari to review the action of the Court of Appeals for the Fourth Circuit which summarily affirmed the action of the District Court in releasing respondent from custody and preventing a retrial.

No. 80–1650. ILLINOIS *v.* ZEGART. Sup. Ct. Ill. Certiorari denied. Reported below: 83 Ill. 2d 440, 415 N. E. 2d 341.

CHIEF JUSTICE BURGER, with whom JUSTICE BLACKMUN and JUSTICE REHNQUIST join, dissenting.

I dissent from the denial of certiorari because the decision of the Supreme Court of Illinois is directly contrary to *Illinois* v. *Vitale*, 447 U. S. 410 (1980), and other decisions of this Court.

Respondent drove her eastbound automobile over a highway dividing median, striking a westbound car head on and killing two 13-year-old girls who were passengers in the westbound car. An Illinois State Police officer at the scene cited respondent for the traffic offense of crossing the median.[1] In January 1976, she pleaded guilty to that offense and she was convicted and fined.

In May 1976, following an investigation of the collision, a state grand jury indicted respondent on two counts of reckless homicide.[2] The State subsequently filed a bill of particulars indicating that in order to show that respondent's conduct leading up to the collision was reckless, it would

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[1] Ill. Rev. Stat., ch. 95½, § 11–708 (d) (1979). This statute provides:

"Whenever any highway has been divided into 2 or more roadways by leaving an intervening space or by a physical barrier or a clearly indicated dividing section so constructed as to impede vehicular traffic, every vehicle must be driven only upon the right-hand roadway unless directed or permitted to use another roadway by official traffic-control devices or police officers. *No vehicle may be driven over, across, or within any such dividing space, barrier, or section,* except through an opening in the physical barrier, or dividing section, or space, or at a cross-over or intersection as established by public authority." (Emphasis supplied.)

[2] Ill. Rev. Stat., ch. 38, § 9–3 (a) (1979). This statute provides:

"A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly, except in cases in which the cause of the death consists of the driving of a motor vehicle, in which case the person commits reckless homicide."

prove that she drove too fast for conditions; failed to reduce speed to avoid an accident; failed to drive her vehicle in the proper lane of the roadway; failed to exercise due care for the safety of persons rightfully on the highway; improperly passed on the right; improperly passed on the left; and failed to wear corrective lenses as required by her driver's license. The State explained that it would use the fact that respondent had driven across the center line of the highway only "in order to show the causal nexus between [respondent's] conduct prior to actually crossing the median strip and the death of the two victims." [3]

The trial court granted respondent's motion to dismiss the indictment on double jeopardy grounds, and the Appellate Court affirmed. The divided Supreme Court of Illinois also affirmed, reasoning that "the State intends to use the factual basis which led to the first conviction as the basis for the second conviction." 83 Ill. 2d 440, 445, 415 N. E. 2d 341, 343 (1980).

Illinois v. *Vitale*, *supra*, involved strikingly similar facts. The respondent's automobile struck and killed two children; a police officer at the scene issued a traffic citation charging the respondent with failing to reduce speed to avoid an accident; the respondent was convicted and fined; the State then charged him with involuntary manslaughter under the statute involved in the present case.[4] The Supreme Court of Illinois, by precisely the same division as that presented here, held that the second prosecution was barred by the Double Jeopardy Clause of the Federal Constitution. Noting that "[t]he sole question before us is whether the offense of failing

[3] App. to Pet. for Cert. 2d. The State's first bill of particulars listed "driving across the center line and median strip" as reckless conduct. However, the trial court granted the State leave to amend that bill, and the State struck that item except with respect to causation.

[4] At the time Vitale was prosecuted, the statute treated reckless homicide as an optional lesser included offense in cases involving involuntary manslaughter by automobile. 447 U. S., at 413, n. 4.

to reduce speed to avoid an accident is the 'same offense' for double jeopardy purposes as the manslaughter charges brought against Vitale," *id.*, at 415–416, we held:

> "[T]he *Blockburger* test [*Blockburger* v. *United States*, 284 U. S. 299 (1932)] focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial. Thus [in *Brown* v. *Ohio*, 432 U. S. 161, 166 (1977),] we stated that if 'each *statute* requires proof of an additional fact which the other does not,' . . . the offenses are not the same under the *Blockburger* test." *Id.*, at 416, quoting 432 U. S., at 166 (emphasis supplied by *Vitale* Court).

We amplified this by example. *Brown* v. *Ohio*, we explained, depended on the fact that a prosecutor who has established the offense of "joyriding" need only prove the requisite intent in order to establish auto theft, and " 'the prosecutor who has established auto theft necessarily has established joyriding as well.' " *Vitale*, *supra*, at 417, quoting *Brown*, *supra*, at 168. If proof of auto theft had not necessarily involved proof of joyriding, "the successive prosecutions would not have been for the 'same offense' within the meaning of the Double Jeopardy Clause." 447 U. S., at 417. We concluded, in a holding directly controlling in the case at bar:

> "[I]f manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the 'same' under the *Blockburger* test. *The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution.*" *Id.*, at 419 (emphasis supplied).

In the present case, the proof necessary to establish the first offense was that respondent drove across the median. The proof necessary to establish the second offense was that respondent acted recklessly and that the reckless acts caused

deaths. The State Supreme Court has—inexplicably, even incredibly—relied on *Vitale* to hold that simply because crossing the median was necessarily proved in order to convict respondent of the traffic offense of driving across the median, the State was barred from proving in the present case that there was *a causal connection* between respondent's alleged recklessness and the deaths of the victims. This is but another example of judicial analysis carrying a sound principle beyond the outer limits of logic and producing an irrational result.

Our cases, particularly *Vitale* and *Brown*, require the courts to look to the *statutory* elements of the first and second charges, not to the similarities of facts in the government's proof.[5] The Supreme Court of Illinois plainly failed to do so in this case. I would grant certiorari and summarily reverse.[6]

No. 80–1659. DUCKWORTH, WARDEN *v.* OWEN. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 645 F. 2d 74.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The question presented in this habeas corpus case is whether the Court of Appeals for the Seventh Circuit correctly held that respondent's challenges to his conviction should be governed by the Federal Rules of Evidence rather than state criminal law. Because I believe that the Court of Appeals has confused the applicability of the Federal Rules of Evi-

[5] See also *Iannelli* v. *United States*, 420 U. S. 770, 785, n. 17 (1975): "If each [offense] requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes."

[6] In *Vitale*, we remanded for a determination of whether manslaughter by automobile always requires proof of failure to slow. There is no occasion for a remand in this case because, as the State Supreme Court's certification in *Vitale* plainly shows, proof of crossing the median is not always necessary to establish the homicide offense.

dence with the permissible limits of its inquiry in a federal habeas proceeding, I dissent from the denial of the petition for certiorari.

During the course of respondent's criminal trial, one of the jurors received an anonymous telephone call that she considered threatening. She reported this call to the trial judge who conducted an *in camera* hearing and determined that she was capable of rendering an impartial verdict. In a post-conviction proceeding, respondent asserted that the juror subsequently told other jurors about this call, which constituted juror misconduct and introduced a prejudicial influence into the deliberations. The Public Defender, who had contacted 10 of the 12 jurors, testified that 8 jurors responded to questions regarding their knowledge of a telephone threat during the trial. The trial court refused to grant a mistrial based on these allegations. The Supreme Court of Indiana affirmed. *Owen* v. *State*, 269 Ind. 513, 381 N. E. 2d 1235 (1978). It relied on Indiana state law which prohibits the interrogation of jurors for the purpose of impeaching a jury verdict.

Respondent then petitioned for a writ of habeas corpus. The District Court denied the writ, finding no constitutional error in the state-court ruling or procedure. The Court of Appeals for the Seventh Circuit reversed. 645 F. 2d 74 (1980). It concluded that the Federal Rules of Evidence govern federal habeas proceedings, not Indiana law. Fed. Rule Evid. 1101 (c). The evidentiary question is thus governed by Federal Rule of Evidence 606 (b), which permits a juror to testify as to whether prejudicial information was brought to bear on any juror, not the contrary Indiana law.*

*Rule 606 (b) of the Federal Rules of Evidence provides in pertinent part:

"Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to . . . the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify

It concluded that respondent "may be able to prove facts which would entitle him to habeas relief by use of permissible means and that, through no fault of [respondent], the pertinent factual issues were not fully and adequately litigated in state court." App. to Pet. for Cert. A–5. Accordingly, the court held that respondent was entitled to an evidentiary hearing.

In my view, the Court of Appeals confused the rules of evidence which are applicable in a federal habeas proceeding with the rules of law which may properly be applied by a state court on direct review. No one would disagree with the conclusion of the Court of Appeals that Indiana rules of evidence do not apply in a federal habeas proceeding. But the question is not whether Indiana rules of law govern a federal habeas proceeding, but whether Indiana is bound by the United States Constitution to apply the Federal Rules of Evidence in its own courts. In my view, unless a state rule of law violates the Constitution, a federal habeas court is without authority to invalidate it. Rules of evidence in state criminal trials are matters of state law and therefore questions to be determined solely by state courts. See, *e. g.*, *Monk* v. *Blackburn*, 605 F. 2d 837 (CA5 1979). The fundamental error of the court below here is that it never squarely addressed the question whether the Indiana rule prohibiting the impeachment of a verdict by a juror violates the Constitution, and hence should be invalidated. Nor does the court explain why, if the Indiana state rule is *not* unconstitutional, the federal habeas court is entitled to circumvent it.

Indeed, in asserting the applicability of Rule 606 (b), the court states that the Rule "tracks the pre-existing case law, which embodied a flexible approach to the evidentiary prob-

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on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes."

lem to which the rule is addressed." App. to Pet. for Cert. A–8. The only case from this Court cited for that proposition is *Parker* v. *Gladden*, 385 U. S. 363 (1966), in which the *state* trial court, on a petition for postconviction relief, heard testimony from a juror and found that an " 'unauthorized communication was prejudicial and that such conduct materially affected the rights of the [petitioner].' " *Id.*, at 364. Though the Supreme Court of Oregon reversed, this Court in turn reversed that holding in a three-page *per curiam* opinion. It is clear from that case that Oregon law, unlike Indiana law, *did* permit a juror to impeach a jury verdict under certain circumstances. *Id.*, at 363, n. 1. Thus, all *Parker* establishes is that Indiana follows a stricter view of the right of a juror to impeach a verdict than Oregon: it does not establish that the Federal Rules of Evidence are constitutionally mandated in a trial conducted in the Indiana state courts.

In sum, the decision below can be read as establishing a constitutional requirement that the Federal Rules of Evidence apply to criminal trials in the 50 state courts. Because I doubt the validity of that requirement, I would grant the petition for certiorari to review the judgment of the Court of Appeals.

No. 80–1684. PEAT, MARWICK, MITCHELL & CO. ET AL. *v.* WACHOVIA BANK & TRUST CO., N. A., ET AL.;

No. 80–1691. WHITE & CASE ET AL. *v.* WACHOVIA BANK & TRUST CO., N. A., ET AL.; and

No. 80–1802. JOY ET AL. *v.* WACHOVIA BANK & TRUST CO., N. A., ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE STEWART would grant certiorari. Reported below: 209 U. S. App. D. C. 9, 650 F. 2d 342.

No. 80–1688. BADONI ET AL. *v.* BROADBENT, COMMISSIONER, BUREAU OF RECLAMATION, ET AL. C. A. 10th Cir. Motion of American Baptist Churches in the U. S. A. et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 638 F. 2d 172.

No. 80–1859. BALTER *v.* ETHYL CORP. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 386 So. 2d 1220.

Rehearing Denied

No. 79–621. ARIZONA *v.* MANYPENNY, 451 U. S. 232;

No. 79–1176. CITY OF MEMPHIS ET AL. *v.* GREENE ET AL., 451 U. S. 100;

No. 80–1395. BRADLEY ET AL. *v.* J. F. BATTE & SONS OF RICHMOND, INC., ET AL.; and LAFAYETTE, INC., ET AL. *v.* J. F. BATTE & SONS OF RICHMOND, INC., ET AL., 451 U. S. 909;

No. 80–1470. PENNINGTON ET AL. *v.* UNITED STATES, 451 U. S. 938;

No. 80–5980. COLEMAN *v.* BALKCOM, WARDEN, 451 U. S. 949; and

No. 80–6293. IN RE JONES, 451 U. S. 936. Petitions for rehearing denied.

JUNE 18, 1981

Miscellaneous Order

No. A–1046 (80–2078). DAMES & MOORE *v.* REGAN, SECRETARY OF THE TREASURY, ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 932.] Joint application for waiver of the page limitation of the parties' briefs on the merits, addressed to CHIEF JUSTICE BURGER and referred to the Court, granted. Motion of petitioner to dispense with printing the joint appendix denied.

JUNE 19, 1981

Dismissal Under Rule 53

No. 80–2040. NATIONAL LABOR RELATIONS BOARD *v.* LEONARD CREATIONS OF CALIFORNIA, INC. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 638 F. 2d 111.

JUNE 22, 1981

Appeals Dismissed

No. 80–1805. BOSWORTH, DBA GULF TO BAY TITLE CO. *v.* COONEY, EXECUTOR. Appeal from Ct. App. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 156 Ga. App. 274, 274 S. E. 2d 604.

No. 80–1818. MCLENDON *v.* ALABAMA DEPARTMENT OF REVENUE. Appeal from Ct. Civ. App. Ala. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 395 So. 2d 71.

No. 80–6657. PATTERSON *v.* ABERNATHY ET AL. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 80–1861. DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE ET AL. *v.* RODGERS ET AL.; and

No. 80–1862. WILLIAMS *v.* KRUEGER. Appeals from Sup. Ct. Mich. dismissed for want of jurisdiction. Reported below: 410 Mich. 144, 300 N. W. 2d 910.

No. 80–6355. MORRIS *v.* CALIFORNIA. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument.

No. 80–6607. RAY *v.* ILLINOIS. Appeal from App. Ct. Ill., 5th Dist., dismissed for want of substantial federal question. Reported below: 88 Ill. App. 3d 1010, 411 N. E. 2d 88.

No. 80–6618. BARTUS *v.* WISCONSIN. Appeal from Sup. Ct. Wis. dismissed for want of substantial federal question. Reported below: 98 Wis. 2d 758, 305 N. W. 2d 146.

Certiorari Granted—Reversed and Remanded. (See No. 80–813, *ante*, p. 714.)

Certiorari Granted—Vacated and Remanded

No. 80–1013. FORD MOTOR CREDIT CO. ET AL. *v.* MURPHY. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Anderson Bros. Ford* v. *Valencia*, *ante*, p. 205. Reported below: 629 F. 2d 556.

No. 80–1393. MISSOURI *v.* CREWS; MISSOURI *v.* CREWS; MISSOURI *v.* HELTON; and MISSOURI *v.* TUNSTALL. Ct. App. Mo., Eastern Dist. Motions of respondents Timothy Crews, Willie Tunstall, and Terry Gene Crews for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Albernaz* v. *United States*, 450 U. S. 333 (1981). Reported below: 607 S. W. 2d 759 (first case); 607 S. W. 2d 729 (second case); 607 S. W. 2d 772 (third case); 607 S. W. 2d 809 (fourth case).

Miscellaneous Orders

No. D–111. IN RE DISBARMENT OF CHAPMAN. It having been reported to the Court that Gerald McNamara Chapman has been reinstated on the roll of attorneys admitted to practice in the State of Illinois, it is ordered that the order of this Court entered June 13, 1977 [431 U. S. 962], suspending Gerald McNamara Chapman from the further practice of law in this Court is vacated and that the rule to show cause issued June 13, 1977, is discharged.

No. D–175. IN RE DISBARMENT OF FELDSHUH. Disbarment entered. [For earlier order herein, see 444 U. S. 895.]

No. 85, Orig. TEXAS *v.* OKLAHOMA. Motion for entry of judgment by consent of plaintiff and defendant referred to the Special Master. [For earlier order herein, see, *e. g.*, 450 U. S. 1038.]

No. 80–885. NATIONAL LABOR RELATIONS BOARD *v.* HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORP.; NATIONAL LABOR RELATIONS BOARD *v.* MALLEABLE IRON RANGE CO.; and

No. 80–1103. HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. [Certiorari granted, 450 U. S. 964.] Motions of Hendricks County Rural Electric Membership Corp. and Malleable Iron Range Co. for divided argument granted. Requests for additional time for oral argument denied.

No. 80–931. CHARLES D. BONANNO LINEN SERVICE, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 1st Cir. [Certiorari granted, 450 U. S. 979.] Motion of Golden Bear Motors, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 80–965. TEXACO, INC., ET AL. *v.* SHORT ET AL.; and

No. 80–1018. POND ET AL. *v.* WALDEN ET AL. Sup. Ct. Ind. [Probable jurisdiction noted, 450 U. S. 993.] Motion of Save Our Cumberland Mountains, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 80–1882. CHAPMAN ET AL. *v.* DOW CHEMICAL CO. ET AL. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 80–5727. EDDINGS *v.* OKLAHOMA. Ct. Crim. App. Okla. [Certiorari granted, 450 U. S. 1040.] Motion of National Council on Crime and Delinquency et al. for leave to file a brief as *amici curiae* granted.

No. 80–5889. SANTOSKY ET AL. *v.* KRAMER, COMMISSIONER, ULSTER COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. [Certiorari granted, 450 U. S. 993.] Motion of H. Randall Bixler to permit Stephen Scavuzzo, Esquire, to present oral argument *pro hac vice* granted.

No. 80–2078. DAMES & MOORE *v.* REGAN, SECRETARY OF THE TREASURY, ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 932.] Motions for leave to file briefs as *amici curiae* by the following were granted: Daniel, Mann, Johnson & Mendenhall; Chas. T. Main International, Inc.; American Bell International, Inc.; Jerry Plotkin; Sperry Corp. et al.; Reading & Bates Corp. et al.; Morgan Guaranty Trust Co. of New York et al.; Bank Melli Iran et al.; Sylvania Technical Systems, Inc.; Marschalk Co., Inc.; Electronic Data Systems Corporation Iran; and FLAG, Inc. Motion of Bank Melli Iran et al. for leave to intervene denied. Motions of intervenor/respondents Islamic Republic of Iran and Bank Markazi Iran for divided argument and for additional time for oral argument granted, and a total of two hours allotted for oral argument to be divided as follows: one hour for the petitioner, 40 minutes for the Solicitor General, 10 minutes for the Islamic Republic of Iran, and 10 minutes for Bank Markazi Iran. Motions of Reading & Bates Corp. et al. and Electronic Data Systems Corporation Iran for leave to participate in oral argument as *amici curiae* denied. Motion of Marschalk Co., Inc., for leave to participate in oral argument as *amicus curiae* and for additional time for argument denied.

Certiorari Granted

No. 79–1738. NIXON *v.* FITZGERALD; and

No. 80–945. HARLOW ET AL. *v.* FITZGERALD. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument.

No. 80–1349. WASHINGTON *v.* CHRISMAN. Sup. Ct. Wash. Certiorari granted. Reported below: 94 Wash. 2d 711, 619 P. 2d 971.

No. 80–1804. LEDBETTER, SHERIFF, ET AL. *v.* JONES ET AL. C. A. 5th Cir. Certiorari granted.* Reported below: 636 F. 2d 1364.

*[REPORTER'S NOTE: For amendment of this order, see 453 U. S. 911.]

No. 80–1925. UNITED TRANSPORTATION UNION *v.* LONG ISLAND RAILROAD CO. ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 634 F. 2d 19.

No. 80–1690. AMERICAN MEDICAL ASSN. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari granted. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 638 F. 2d 443.

No. 80–1714. BRITTON, CORRECTIONS COMMISSIONER, ET AL. *v.* EVANS. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 628 F. 2d 400 and 639 F. 2d 221.

No. 80–2049. RALSTON, WARDEN *v.* ROBINSON. C. A. 7th Cir. Motion of the Solicitor General to expedite consideration of the petition for writ of certiorari granted. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 642 F. 2d 1077.

No. 80–6045. KREMER *v.* CHEMICAL CONSTRUCTION CORP. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 623 F. 2d 786.

Certiorari Denied. (See also Nos. 80–1805, 80–1818, 80–6657, and 80–6355, *supra.*)

No. 80–1319. FLORIDA *v.* STUART. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 389 So. 2d 4.

No. 80–1338. WATERVAL *v.* DISTRICT COURT IN AND FOR EL PASO COUNTY, COLORADO, ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 620 P. 2d 5.

No. 80–1491. TELTRONICS SERVICES, INC. *v.* L. M. ERICSSON TELECOMMUNICATIONS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 642 F. 2d 31.

No. 80–1553. FENDLER *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 127 Ariz. 464, 622 P. 2d 23.

No. 80–1588. JACOBS *v.* UNITED STATES; and
No. 80–1788. SCHOENDORF *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1205.

No. 80–1625. GRANITE INVESTMENT CO. ET AL. *v.* FEDERAL SAVINGS AND LOAN INSURANCE CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 630 F. 2d 515.

No. 80–1662. BARTLETT-COLLINS CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 639 F. 2d 652.

No. 80–1679. SCOTTO *v.* UNITED STATES; and
No. 80–1746. ANASTASIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 641 F. 2d 47.

No. 80–1680. CHEVRON CHEMICAL CO. *v.* GORSUCH, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. C. A. 3d Cir. Certiorari denied. Reported below: 641 F. 2d 104.

No. 80–1693. CHURCH OF SCIENTOLOGY OF CALIFORNIA *v.* FOLEY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 205 U. S. App. D. C. 364, 640 F. 2d 1335.

No. 80–1700. THOMPSON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 631 F. 2d 642.

No. 80–1702. NICOSIA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 638 F. 2d 970.

No. 80–1706. LACHANCE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 652 F. 2d 55.

No. 80–1707. LEVERAGE FUNDING SYSTEMS, INC., ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 637 F. 2d 645.

No. 80–1725. GOLDSTEIN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 635 F. 2d 356.

No. 80–1729. MAZUR *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 649 F. 2d 860.

No. 80–1733. OHL *v.* OHL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 392 So. 2d 87.

No. 80–1761. DUPLER *v.* MANSFIELD JOURNAL CO. Sup. Ct. Ohio. Certiorari denied. Reported below: 64 Ohio St. 2d 116, 413 N. E. 2d 1187.

No. 80–1772. ALTON & SOUTHERN RAILWAY CO. *v.* BUCHANAN. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 87 Ill. App. 3d 1199, 414 N. E. 2d 1391.

No. 80–1785. A & B FREIGHT LINES, INC., ET AL. *v.* FEDERAL TRADE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 80–1787. BREWER ET UX. *v.* MEMPHIS PUBLISHING CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 1238.

No. 80–1796. HANTZIS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. Reported below: 638 F. 2d 248.

No. 80–1801. OVERSEAS RALEIGH MANUFACTURING, LTD. *v.* PAN AMERICAN WORLD AIRWAYS, INC. Ct. App. N. Y. Certiorari denied. Reported below: 51 N. Y. 2d 960, 416 N. E. 2d 1039.

No. 80–1803. TEDESCO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 635 F. 2d 902.

No. 80–1807. SANCHEZ, ADMINISTRATRIX *v.* LOFFLAND BROTHERS CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 1228.

No. 80–1819. SWISSVALE AREA SCHOOL DISTRICT ET AL. *v.* HOOTS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 972.

No. 80–1821. WEAVER *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 271 Ark. 853, 612 S. W. 2d 324.

No. 80–1826. TRINIDAD *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 388 So. 2d 1063.

No. 80–1833. FAIRCLOTH *v.* NORFOLK & WESTERN RAILWAY CO. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 89 Ill. App. 3d 923, 412 N. E. 2d 634.

No. 80–1845. LENNOX INDUSTRIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 637 F. 2d 340.

No. 80–1852. MCGOFF ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 207 U. S. App. D. C. 360, 647 F. 2d 185.

No. 80–1853. TAYLOR *v.* ROADWAY EXPRESS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 632 F. 2d 891.

No. 80–1857. CITIZENS CONCERNED FOR SEPARATION OF CHURCH AND STATE *v.* CITY AND COUNTY OF DENVER. C. A. 10th Cir. Certiorari denied. Reported below: 628 F. 2d 1289.

No. 80–1873. FRANK ET AL. *v.* UNITED STATES TRUST COMPANY OF NEW YORK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 637 F. 2d 672.

No. 80–1875. LUPTAK *v.* CENTRAL CARTAGE CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 647 F. 2d 165.

No. 80–1892. ATKINS *v.* MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: 644 F. 2d 543.

No. 80–1911. COLLINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 642 F. 2d 217.

No. 80–1931. COOK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 652 F. 2d 55.

No. 80–1936. LOMBARDO, T/A UMBERTO'S OF NAPLES *v.* MAYER ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80–1965. YEATTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 639 F. 2d 1186.

No. 80–1969. MACEYAK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 644 F. 2d 882.

No. 80–6317. ENGLAND *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 395 So. 2d 819.

No. 80–6332. JONES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 88 Ill. App. 3d 629, 410 N. E. 2d 1122.

No. 80–6398. BEVERLY P. *v.* ANNE B. ET VIR. Sup. Ct. N. H. Certiorari denied. Reported below: 120 N. H. 791, 424 A. 2d 178.

No. 80–6419. BARKER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 83 Ill. 2d 319, 415 N. E. 2d 404.

No. 80–6494. DELLING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 647 F. 2d 166.

No. 80–6521. THOMPSON *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 226 Ct. Cl. 587, 652 F. 2d 68.

No. 80–6523. BROOKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 634 F. 2d 636.

No. 80-6540. LUNDY *v.* SALCINES, STATE ATTORNEY FOR HILLSBOROUGH COUNTY, FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 80-6580. ZARRILLI *v.* CAPITOL BANK & TRUST CO. ET AL. Sup. Jud. Ct. Mass. Certiorari denied.

No. 80-6581. MCDONALD *v.* DRAPER, JUDGE. Sup. Ct. Tenn. Certiorari denied.

No. 80-6583. CONQUEST ET AL. *v.* HILTON ET AL. C. A. 3d Cir. Certiorari denied.

No. 80-6589. JIMENEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 609 S. W. 2d 558.

No. 80-6593. REITER *v.* CITY OF KEENE. Ct. Civ. App. Tex., 10th Sup. Jud. Dist. Certiorari denied. Reported below: 601 S. W. 2d 547.

No. 80-6594. ALLEN *v.* CURRY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 659 F. 2d 1057.

No. 80-6595. ALVAREZ *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 80-6596. SCHELL *v.* WARREN. Ct. App. Ga. Certiorari denied. Reported below: 157 Ga. App. 306, 277 S. E. 2d 346.

No. 80-6601. STEELE *v.* CORBITT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 639 F. 2d 782.

No. 80-6602. LALANDE *v.* SPALDING ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 651 F. 2d 643.

No. 80-6605. POWELL *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. C. A. 9th Cir. Certiorari denied.

No. 80-6619. HEFLIN *v.* FRANZEN, CORRECTIONS DIRECTOR, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 654 F. 2d 725.

No. 80–6621. BEARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 636 F. 2d 312.

No. 80–6622. WHITE *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 611 S. W. 2d 529.

No. 80–6632. HELMICK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 652 F. 2d 59.

No. 80–6638. PITTS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 613 S. W. 2d 753.

No. 80–6667. KENNEDY *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 80–6708. YAGER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 270.

No. 80–6717. CARTER *v.* THEUS. C. A. 10th Cir. Certiorari denied.

No. 80–6718. ROSE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 270.

No. 80–6735. CASTLEBERRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 642 F. 2d 1151.

No. 80–6744. ANNUNZIATO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 643 F. 2d 676.

No. 80–6745. BAISDEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 2d 266.

No. 80–6748. BRIM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 630 F. 2d 1307.

No. 80–6752. BENNETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 642 F. 2d 1214.

No. 80–6762. AGUIRRE-CARRERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 642 F. 2d 457.

No. 80–781. INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO, CLC, ET AL. *v.* WESTINGHOUSE ELECTRIC CORP.; and

No. 80–944. WESTINGHOUSE ELECTRIC CORP. *v.* INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO, CLC, ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of these petitions. Reported below: 631 F. 2d 1094.

No. 80–955. WESTINGHOUSE ELECTRIC CORP. *v.* WENGER, COMMISSIONER, WEST VIRGINIA DEPARTMENT OF EMPLOYMENT SECURITY, ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 631 F. 2d 729.

No. 80–1635. WESTINGHOUSE ELECTRIC CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition.

No. 80–1813. DUBNO, COMMISSIONER OF REVENUE SERVICES OF CONNECTICUT, ET AL. *v.* MOBIL OIL CORP. ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 639 F. 2d 919.

No. 80–1864. TULLY, COMMISSIONER OF TAXATION AND FINANCE OF NEW YORK, ET AL. *v.* NEW ENGLAND PETROLEUM CORP. ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 639 F. 2d 912.

No. 80–1928. GUILD TRUST ET AL. *v.* AMOCO PRODUCTION CO. ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 636 F. 2d 261.

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No. 80–6531. STEBBINS *v.* FIREMAN'S FUND INSURANCE CORP. ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition.

No. 80–827. SCANLON, SECRETARY OF EDUCATION OF PENNSYLVANIA *v.* BATTLE ET AL. C. A. 3d Cir. Motion of National School Boards Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 629 F. 2d 269.

No. 80–1365. CONNECTICUT *v.* MOHEGAN TRIBE. C. A. 2d Cir. Certiorari denied. Reported below: 638 F. 2d 612.

JUSTICE REHNQUIST, dissenting.

This case involves the scope and applicability of the Nonintercourse statute, first enacted in 1790 and now codified in 25 U. S. C. § 177, which prohibits the sale of Indian land unless conveyed by a treaty approved by the Federal Government. The Court of Appeals for the Second Circuit held that the terms of the Nonintercourse statute apply to all land throughout the United States. Because the decision below casts doubt on the title to land in millions of acres in the eastern part of the United States, I would grant the petition for certiorari.

In 1977, respondent brought suit to obtain possession of approximately 600 acres of land currently in the possession of the State of Connecticut. Respondent claimed that it owned this land from "time immemorial" and that the land was subsequently acquired from respondent without the approval of the United States, in violation of the Nonintercourse statute of 1790 and its successor statutes. The District Court denied petitioner's motion to dismiss, but certified the question for interlocutory appeal pursuant to 28 U. S. C. § 1292 (b).

The Court of Appeals for the Second Circuit affirmed. 638 F. 2d 612 (1980). Petitioner argued that the Nonintercourse

statute applies only to Indian land in "Indian country," which would be primarily western lands as defined in the various Indian Trade and Intercourse Acts, and not to all Indian land. Petitioner also pointed to a provision in several of the Nonintercourse statutes which stated that nothing in the statute prohibited trade or intercourse with Indians living on land "surrounded by settlements." See *id.*, at 618. It was petitioner's view that Indian land in Connecticut was exempt from the provisions of the Nonintercourse statute, since it was clearly "surrounded by settlements." The court observed:

> "In these suits, [petitioner] states have marshalled historical evidence which suggests that the eastern Indian tribes and their lands were always understood to be under the jurisdiction of the states. While these arguments have been held to be unavailing in a number of other contexts, such as whether the eastern tribes were properly considered 'tribes' under the protection of the federal government, and whether they were considered 'tribes' for purposes of sovereign immunity to suit, *until this action,* no court has had to address directly the issue of whether the Nonintercourse statute was intended to apply to land held by the eastern tribes. The State's argument is admittedly appealing in that it would explain why both the states and the federal government have ignored so completely what the Indians assert to be the dictates of the Nonintercourse statute." *Id.*, at 615 (footnotes omitted and emphasis added).

Notwithstanding this concession, the Court of Appeals, after canvassing the history of the Indian statutes and relevant aspects of Indian land tenure, ultimately concluded that the Nonintercourse statute applied to all Indian land, whether or not it was in Indian country, and thus included the land claimed by respondent.

There can be little doubt that the Court of Appeals' un-

precedented holding makes millions of acres in the eastern United States vulnerable to Indian land-title claims. For that reason alone, I believe that this Court should grant plenary consideration over this case and determine this vitally important issue. Though I do not propose here to address the merits of the decision below, I do note that the Court of Appeals struggled with two somewhat conflicting decisions of this Court, *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661 (1974), and *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653 (1979). The Court of Appeals felt that *Oneida* supported, at least obliquely, the position of respondent here, while *Wilson* supported that of the petitioner.

As support for the proposition that Indian title to land in the 13 original States could not be extinguished without the consent of the Federal Government, the Court of Appeals cited this dicta from *Oneida:*

> "The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the pre-emptive right to purchase from the Indians, was in the State, *Fletcher* v. *Peck*, 6 Cranch 87 (1810). But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law." 414 U. S., at 670 (footnote omitted) (quoted in 638 F. 2d, at 625).

The meaning of this passage is somewhat unclear, since a footnote to that passage, omitted by the Court of Appeals here, suggests that the United States *does* hold fee title to some portion of Indian land. The footnote reads:

> "See also *Cherokee Nation* v. *Georgia*, [5 Pet.], at 38;

Clark v. *Smith*, 13 Pet. 195 (1839); *Lattimer* v. *Poteet*, 14 Pet. 4 (1840); *Seneca Nation* v. *Christy*, 162 U. S. 283 (1896). *'Outside of the territory of the original colonies, the ultimate fee is located in the United States and may be granted to individuals subject to the Indian right of occupancy.'* Federal Indian Law 599; *Missouri* v. *Iowa*, 7 How. 660 (1849)." 414 U. S., at 670, n. 6 (emphasis supplied).

And in a recent decision, *Wilson* v. *Omaha Indian Tribe*, *supra*, this Court took a more limited view of the territorial applicability of the Trade and Intercourse Acts. The Court held that the present-day descendant of § 22 of the 1834 Act, which establishes the burden of proof in land disputes between Indians and "a white person," did not apply to a suit between the State of Iowa and an Indian tribe. The Court relied on the fact that the original § 22 was incorporated into the 1834 Act which, in our view, was meant to apply only "'to the whole Indian country.'" 442 U. S., at 667, quoting H. R. Rep. No. 474, 23d Cong., 1st Sess., 10 (1834). We explained that "it is apparent that in adopting § 22 Congress had in mind only disputes arising in *Indian country, disputes that would not arise in or involve any of the States.*" 442 U. S., at 668 (emphasis supplied). Thus, in *Wilson*, the Court implicitly confirmed that the various versions of the Trade and Intercourse Acts were intended to apply only in Indian country.

I am not at all sure how the issue presented here should be finally resolved. It is clear to me, however, that numerous suits have been brought by Indian tribes in the eastern part of the United States asserting claims to large tracts of lands and that the decision below throws into uncertainty the validity of land titles throughout that area. Accordingly, I believe that the petition for certiorari should be granted in order to at least attempt to rectify that uncertainty.

No. 80–1529. NEW YORK *v.* MACKENZIE. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 78 App. Div. 2d 892, 432 N. Y. S. 2d 901.

No. 80–1601. CROATAN BOOKS, INC. *v.* VIRGINIA. Cir. Ct. Fairfax County, Va. Certiorari denied. JUSTICE BRENNAN, JUSTICE STEWART, and JUSTICE MARSHALL would grant the petition and reverse the judgment of conviction.

No. 80–1884. MEMOREX CORP. ET AL. *v.* INTERNATIONAL BUSINESS MACHINES CORP. C. A. 9th Cir. Motion of Transamerica Computer Co., Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE BLACKMUN and JUSTICE STEVENS took no part in the consideration or decision of this motion and this petition. Reported below: 636 F. 2d 1188.

No. 80–2111. AMERICAN BELL INTERNATIONAL, INC. *v.* ISLAMIC REPUBLIC OF IRAN ET AL. C. A. D. C. Cir. Motion of petitioner to expedite consideration of the petition for writ of certiorari granted. Certiorari before judgment denied. JUSTICE STEWART took no part in the consideration or decision of this motion and this petition.

No. 80–6437. MCMORRIS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 394 So. 2d 392.

No. 80–6740. BRITZ *v.* PRESBYTERIAN UNIVERSITY HOSPITAL. C. A. 3d Cir. Motion of respondent for damages denied. Certiorari denied. Reported below: 649 F. 2d 858.

No. 80–6799. LAYTON *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner to expedite consideration of the petition for writ of certiorari granted. Certiorari denied. Reported below: 645 F. 2d 681.

No. 80–6604. THOMAS *v.* GEORGIA. Sup. Ct. Ga.; and

No. 80–6623. COLLINS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: No. 80–6604, 247 Ga. 233, 275 S. E. 2d 318; No. 80–6623, 271 Ark. 825, 611 S. W. 2d 182.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 79–5269. EDWARDS *v.* ARIZONA, 451 U. S. 477;

No. 80–1073. MARCAL *v.* LOUISIANA, 451 U. S. 977;

No. 80–1310. TRANSWESTERN PIPELINE CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION, 451 U. S. 937;

No. 80–1461. CLEAR PINE MOULDINGS, INC. *v.* NATIONAL LABOR RELATIONS BOARD, 451 U. S. 984;

No. 80–1546. ACQUISTO *v.* LEE COUNTY BOARD OF PUBLIC INSTRUCTION ET AL., 451 U. S. 971;

No. 80–6210. BLOCKER *v.* HERMAN ET AL., 451 U. S. 989;

No. 80–6231. DICK *v.* GEORGIA, 451 U. S. 976;

No. 80–6275. TURNER *v.* UNITED STATES, *ante*, p. 907;

No. 80–6360. MOUNT *v.* CHASE BANK ET AL., 451 U. S. 975;

No. 80–6410. FREE *v.* ALABAMA, 451 U. S. 990;

No. 80–6433. CHICCO *v.* PECK, 451 U. S. 1019;

No. 80–6507. BELL *v.* ILLINOIS, *ante*, p. 908;

No. 80–6528. WINCHELL *v.* SECRETARY OF HEALTH AND HUMAN SERVICES, 451 U. S. 992;

No. 80–6554. JOHNSON *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, *ante*, p. 909; and

No. 80–6566. BURROUGHS *v.* SECRETARY OF HEALTH AND HUMAN SERVICES, 451 U. S. 993. Petitions for rehearing denied.

No. 80–6587. IN RE EL-AMIN, 451 U. S. 1016; and

No. 80–6654. IN RE REYNOLDS, *ante*, p. 902. Petitions for rehearing denied.

No. 80–5746. WHITE *v.* UNITED STATES, 449 U. S. 1114; and

No. 80–6239. GUNSTON *v.* UNITED STATES ET AL., 450 U. S. 1034. Motions for leave to file petitions for rehearing denied.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 974 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* McCLURE ET AL.

ON APPLICATION FOR STAY

No. A-961. Decided June 12, 1981

An application to stay the District Court's judgment, which held that the provisions of the Medicare Act for hearings by private insurance carriers concerning claimants' rights to reimbursements for medical services under Part B of the Act violated claimants' due process rights, is granted pending the filing and consideration of the applicants' jurisdictional statement challenging such judgment. Given the presumption of constitutionality granted to Acts of Congress, there is a substantial likelihood that four Justices of this Court will vote to note probable jurisdiction of the applicants' appeal. In addition, because the District Court's remedial order involves a drastic restructuring of the appeals procedure designed by Congress, it will cause hardship to the applicants which should not be imposed until this Court decides whether or not to note probable jurisdiction.

JUSTICE REHNQUIST, Circuit Justice.

Applicants request that I stay a judgment of the District Court for the Northern District of California pending a direct appeal of that judgment to this Court pursuant to 28 U. S. C. § 1252. On May 5, 1981, applicants filed a notice of appeal.

This case involves the constitutionality of the hearing procedures available under Part B of the Medicare Act, 42 U. S. C. §§ 1395j–1395w, 1395ff (1976 ed. and Supp. III). The Medicare Act is divided into two parts. Part A provides insurance for hospital and related posthospital services. 42 U. S. C. §§ 1395c, 1395d (1976 ed. and Supp. III). Part B provides a voluntary program of supplementary medical insurance covering, in general, 80% of the reasonable costs of

certain other services, primarily physicians services and medical supplies. 42 U. S. C. §§ 1395k, 1395*l* (1976 ed. and Supp. III). The Secretary determines whether an individual is eligible to enroll in the Part B program, and the individual is entitled to an administrative hearing and judicial review of that eligibility determination. 42 U. S. C. §§ 1395ff (a) and (b)(1)(B). As to the implementation of Part B, Congress authorized the Secretary to enter into contracts with private insurance carriers under which the carriers would determine and pay Part B benefits on a reimbursable basis. 42 U. S. C. § 1395u. Under these contracts, the carriers receive advances of funds, which they then disburse to claimants in reimbursement for medical services found by the carriers to be covered by Part B. § 1395u (c). If a claimant is dissatisfied with the reimbursement allowed by the private carrier, the claimant is entitled to a "fair hearing" conducted by the private carrier if the amount of the claim is $100 or more. § 1395u (b)(3)(C). The Act does not provide for an appeal to the Secretary of an adverse judgment by the carrier after a hearing.

Respondents, a class of Part B beneficiaries, brought suit challenging the constitutionality of that hearing procedure. In a decision rendered May 19, 1980, the United States District Court for the Northern District of California concluded that Congress' vesting of final decisionmaking authority in the carrier violates the claimant's due process rights because, in the court's view, hearing officers selected by the carrier may be biased and because hearings conducted by administrative law judges employed by the Government may be more reliable. In relief, the District Court ordered that any Part B claimant whose claim was finally rejected after a full evidentiary hearing by the carrier's hearing officer on or after May 1, 1980, be given the opportunity for a *de novo* evidentiary hearing before an administrative law judge of the Secretary. On May 1, 1981, the District Court denied the applicants' application for a stay of its order pending appeal.

In both form and substance, the District Court has declared unconstitutional an important part of the Medicare statute. Given the presumption of constitutionality granted to all Acts of Congress, I believe that there is a substantial likelihood that four Justices of this Court would vote to note probable jurisdiction of the applicants' appeal. In addition, because the District Court's remedial order involves a drastic restructuring of the appeals procedure carefully designed by Congress, it will cause hardship to the applicants. In the application for a stay, the applicants point out that the day-to-day administration of the Part B program requires a determination of a vast number of individual claims for reimbursement. Indeed, even the District Court noted that, in 1978 alone, more than 124 million such claims were processed. *McClure* v. *Harris*, 503 F. Supp. 409, 416 (1980). The cost of providing administrative law judge hearings to dissatisfied claimants will be substantial even if a small percentage of claimants seek such appeals. Indeed, administrative law judges are already overloaded with cases arising under other statutory provisions in which *Congress* has provided for administrative law judge hearings. I thus believe that the applicants should be relieved of the burden placed on them by the District Court's order until this Court decides whether or not to note probable jurisdiction of the applicants' appeal.

It is, therefore, ordered that the judgment of the District Court in this case be stayed pending the filing and consideration of the jurisdictional statement challenging that judgment by the applicants.

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CRIMINAL LAW. See also **Constitutional Law,** II; III, 1; V; VI, 2; VIII; IX, 2; **Prisons and Prisoners.**

Racketeering—Illegitimate enterprises.—Term "enterprise" as used in 18 U. S. C. §§ 1961–1968, relating to racketeer influenced and corrupt organizations, encompasses illegitimate as well as legitimate enterprises, and thus reach of law is not limited to infiltration by racketeers of legitimate business enterprises. United States v. Turkette, p. 576.

CRUEL AND UNUSUAL PUNISHMENT. See **Constitutional Law,** II.

DENIAL OF COMMUTATION OF LIFE SENTENCE. See **Constitutional Law,** III, 1.

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DISCLOSURE OF CREDITOR STATUS. See **Truth in Lending Act,** 3.

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EMPLOYER'S DECISION TO TERMINATE BUSINESS. See **National Labor Relations Act.**

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FAILURE TO APPEAL ADVERSE JUDGMENT. See **Res Judicata.**

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FAIRS AND FAIRGROUNDS. See **Constitutional Law**, III, 1.

FARMLAND. See **Constitutional Law**, I, 2; III, 4; IV; X, 1.

FEASIBILITY ANALYSIS IN PROMULGATING HEALTH AND SAFETY STANDARDS. See **Occupational Safety and Health Act of 1970.**

FEDERAL INCOME TAXES. See **Treasury Regulations.**

FEDERAL INSURANCE CONTRIBUTIONS ACT. See **Treasury Regulations.**

FEDERAL MINE SAFETY AND HEALTH ACT OF 1977. See **Constitutional Law**, IX, 1.

FEDERAL RULES OF CIVIL PROCEDURE.

Class action—Order prohibiting communications between named plaintiffs and class members.—Under record in class action by black present

FEDERAL RULES OF CIVIL PROCEDURE—Continued.

and former employees and rejected employment applicants against employer and union for alleged discrimination against blacks—employer having previously entered into conciliation agreement with Equal Employment Opportunity Commission and having begun to send notices to employees stating amount of backpay available in return for release of all discrimination claims—District Court abused its discretion under Federal Rules, particularly Rule 23, in entering order prohibiting communications concerning class action between named plaintiffs or their counsel and actual or potential class members, absent court's prior approval. Gulf Oil Co. v. Bernard, p. 89.

FEDERAL-STATE RELATIONS. See **Constitutional Law**, I; X; **Prisons and Prisoners**; **Voting Rights Act of 1965.**

FEDERAL UNEMPLOYMENT TAX ACT. See **Treasury Regulations.**

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FINES. See **Constitutional Law**, I, 2; X, 1; **Justiciability**, 2.

FIRST AMENDMENT. See **Constitutional Law**, III, 1; VI; XI; **Federal Rules of Civil Procedure.**

FOURTEENTH AMENDMENT. See **Constitutional Law**, II; III, 1, 2; V; VI, 2; VII.

FOURTH AMENDMENT. See **Constitutional Law**, IX.

FREEDOM OF RELIGION. See **Constitutional Law**, III, 1.

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GEORGIA. See **Constitutional Law**, V; VIII.

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IMMUNITY OF HEALTH-CARE ORGANIZATIONS FROM ANTITRUST LIABILITY. See **Antitrust Acts.**

IMPLIED REPEAL OF ANTITRUST LAWS. See **Antitrust Acts.**

IMPRISONMENT OF STATE PRISONERS IN FEDERAL PRISONS. See **Prisons and Prisoners.**

INCOME TAXES. See **Treasury Regulations.**

INDIANA. See **Constitutional Law**, I, 2; III, 4; IV; X, 1; **Justiciability**, 2.

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INFILTRATION OF BUSINESSES BY RACKETEERS. See **Criminal Law.**

INSPECTION OF MINES. See **Constitutional Law**, IX, 1.

INSTALLMENT CONTRACTS. See **Truth in Lending Act**, 1, 3.

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INTERNATIONAL UNION'S CONSTITUTION AS CONTRACT WITH LOCAL UNIONS. See **Labor Management Relations Act.**

INTERSTATE COMMERCE. See **Constitutional Law**, I; X.

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JAIL GUARDS. See **Civil Rights Act of 1964.**

JURISDICTION. See **Labor Management Relations Act.**

JUST COMPENSATION CLAUSE. See **Constitutional Law**, IV; **Justiciability**, 1.

JUSTICIABILITY.

1. *Federal regulation of surface coal mining—Assertion of taking claim.*—In action challenging validity of Surface Mining Control and Reclamation Act of 1977, issue whether Act's provisions that prescribe minimum standards for mining on "steep slopes" and that prohibit mining in certain locations violate Just Compensation Clause of Fifth Amendment is not ripe for judicial resolution, since taking claim arose in context of a facial challenge and presented no concrete controversy concerning either Act's application to particular mining operations or its effect on specific land. Hodel v. Virginia Surface Mining & Reclamation Assn., p. 264.

JUSTICIABILITY—Continued.

2. *Federal regulation of surface coal mining—Validity of civil penalties.*—Due process challenges to provisions of Surface Mining Control and Reclamation Act of 1977 that govern collection of civil penalties for violations of Act were premature where appellees did not show that they were ever assessed civil penalties or that they were harmed by any procedures for collection of fines. Hodel v. Virginia Surface Mining & Reclamation Assn., p. 264; Hodel v. Indiana, p. 314.

KLEBERG COUNTY, TEX. See **Voting Rights Act of 1965.**

KRISHNA RELIGION. See **Constitutional Law**, III, 1.

LABOR MANAGEMENT RELATIONS ACT.

Suit by local against international union—Jurisdiction.—A suit by a local union against its parent international union alleging a violation of defendant's constitution arising from its order requiring consolidation of certain local unions, including plaintiff, falls within federal district courts' jurisdiction under § 301 (a) of Act, which establishes such jurisdiction for suits for violations of "contracts" between "labor organizations" representing employees in a covered industry. Plumbers & Pipefitters v. Plumbers & Pipefitters, p. 615.

LABOR UNIONS. See **Labor Management Relations Act; National Labor Relations Act.**

LAND-USE RESTRICTIONS. See **Constitutional Law**, I; III, 3, 4; IV; X; **Justiciability.**

LIBERTY INTERESTS. See **Constitutional Law**, III, 1.

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MOTHER'S RIGHT TO COUNSEL IN PROCEEDINGS TO TERMINATE PARENTAL STATUS. See **Constitutional Law**, VII.

NATIONAL HEALTH PLANNING AND RESOURCES DEVELOPMENT ACT OF 1974. See **Antitrust Acts.**

NATIONAL LABOR RELATIONS ACT.

Employer's duty to bargain—Decision to terminate part of business.—Although petitioner—a company providing commercial housekeeping and maintenance service that terminated its contract with a nursing home and discharged its employees who had worked at home—was required under § 8 (d) of Act to bargain with such employees' union about effects of petitioner's decision, it had no duty to bargain over its decision to terminate nursing home contract. First National Maintenance Corp. v. NLRB, p. 666.

NEW YORK. See **Constitutional Law**, XI.

NORTH CAROLINA. See **Constitutional Law**, VII.

NUDE DANCING. See **Constitutional Law**, VI, 2; XI.

OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970.

Standard for exposure to cotton dust—Validity.—Under § 6 (b)(5) of Act, relating to promulgation of occupational safety and health standards as to toxic materials or harmful physical agents, cost-benefit analysis by Occupational Safety and Health Administration is not required in promulgating a standard, and record supported OSHA's standard setting permissible exposure limits to cotton dust in cotton industry; however, requirement that employers guarantee wage and employment benefits of employees transferred to other positions because of their inability to wear respirators, even if within OSHA's authority, was invalid because of absence of statement of reasons that such requirement was related to achievement of health and safety goals. American Textile Manufacturers Institute v. Donovan, p. 490.

OHIO. See **Constitutional Law**, II.

ORDINANCES PROHIBITING LIVE ENTERTAINMENT. See **Constitutional Law**, VI, 2.

ORGANIZED CRIME CONTROL ACT OF 1970. See **Criminal Law.**

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PARENT AND CHILD. See **Constitutional Law**, III, 2; V; VII; VIII.

PARENT'S ABANDONMENT OF CHILD. See **Constitutional Law,** V; VIII.

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PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See **Constitutional Law,** X.

"PRIME FARMLAND" MINING REGULATIONS. See **Constitutional Law,** I, 2; III, 4; IV; X, 1.

PRISONS AND PRISONERS. See also **Constitutional Law,** II; III, 1.

State prisoners—Transfer to federal prison system.—Title 18 U. S. C. § 5003 (a)—which relates to Attorney General's authority to contract with States to take custody of persons convicted of state offenses and to provide care, treatment, and training of such persons if federal facilities and personnel are available—authorizes transfers without an individual determination that state prisoner needs a particular specialized treatment program available in federal system. Howe v. Smith, p. 473.

PUBLIC EMPLOYEES. See **Certiorari; Civil Rights Act of 1964.**

PUTATIVE FATHER'S RIGHT TO BLOOD GROUPING TESTS IN PATERNITY SUIT. See **Constitutional Law,** III, 2.

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RACIAL DISCRIMINATION. See **Certiorari; Federal Rules of Civil Procedure.**

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RESERVISTS. See **Vietnam Era Veterans' Readjustment Assistance Act of 1975.**

RES JUDICATA.

Dismissal of antitrust actions—Effect on subsequent actions.—In respondents' two state-court antitrust actions against petitioners, owners of department stores, for alleged price fixing, which actions were removed to Federal District Court—respondents having chosen not to appeal from District Court's earlier dismissal of their similar actions that had been filed

RES JUDICATA—Continued.

there and consolidated with five other private antitrust actions against petitioners—res judicata barred relitigation as to respondents' federal-law claims, notwithstanding Court of Appeals subsequently reversed District Court's dismissal of the five other actions that had been initially decided with respondents' first actions. Federated Department Stores, Inc. v. Moitie, p. 394.

RETAIL INSTALLMENT CONTRACTS. See **Truth in Lending Act**, 1, 3.

RIGHT TO COUNSEL. See **Constitutional Law**, VII.

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SECURITY INTERESTS OF CREDITORS. See **Truth in Lending Act**, 1.

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STATE PRISONERS' TRANSFER TO FEDERAL PRISONS. See **Prisons and Prisoners.**

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Medicare Act—Constitutionality of provisions for hearings.—Application to stay District Court's judgment holding that Medicare Act's provisions for hearings by private insurance carriers concerning claimants' rights to reimbursement for medical services under Part B of Act violated claimants' due process rights, is granted. Schweiker v. McClure (REHNQUIST, J., in chambers), p. 1301.

"STEEP SLOPE" MINING REGULATIONS. See **Constitutional Law**, X, 2; **Justiciability**, 1.

STONE QUARRY INSPECTIONS. See **Constitutional Law**, IX, 1.

SURFACE MINE INSPECTIONS. See **Constitutional Law**, IX, 1.

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977. See **Constitutional Law**, I; III, 3, 4; IV; X; **Justiciability.**

TAKING OF PROPERTY. See **Constitutional Law,** IV; **Justiciability,** 1.

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TERMINATION OF PARENTAL STATUS. See **Constitutional Law,** VII.

TOPLESS DANCING. See **Constitutional Law,** XI.

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TRAINING OF MILITARY RESERVISTS. See **Vietnam Era Veterans' Readjustment Assistance Act of 1975.**

TRANSFER OF STATE PRISONERS TO FEDERAL PRISONS. See **Prisons and Prisoners.**

TRAVEL RIGHTS. See **Constitutional Law,** VIII.

TREASURY REGULATIONS.

"Wages" as including meals and lodging.—Treasury Regulations interpreting definition of "wages" in Federal Insurance Contributions Act and Federal Unemployment Tax Act to include value of meals and lodging furnished employees, such as meals and lodging furnished by petitioner taxpayer to its employees on offshore oil rigs, are invalid for failing to implement statutory definition in a consistent or reasonable manner, since other Treasury Regulations interpret substantially identical definition of "wages" in income-tax withholding provisions to exclude such value. Rowan Cos. v. United States, p. 247.

TRUTH IN LENDING ACT.

1. *Automobile retail installment contracts—Disclosure of security interests—Unearned insurance premiums.*—An assignment of unearned insurance premiums—under terms of an automobile retail installment contract whereby buyer was required to purchase insurance on automobile protecting interests of both buyer and seller and to assign to seller any unearned insurance premiums that might be returned if policy were canceled—does not create a "security interest" that must be disclosed pursuant to Act and an implementing regulation. Anderson Bros. Ford v. Valencia, p. 205.

2. *Credit card account—Billing dispute—"Consumer credit."*—Act's provisions requiring creditor, upon receiving notice from debtor, to correct or explain creditor's statement of debtor's account in connection with an

TRUTH IN LENDING ACT—Continued.

extension of "consumer credit" were not applicable to an account dispute between petitioner and a corporation that opened a "company account" with petitioner and had credit cards issued to certain of corporation's officers, since account was opened primarily for business purposes and transactions giving rise to billing dispute were business transactions rather than extensions of "consumer credit." American Express Co. v. Koerner, p. 233.

3. *Retail installment contracts—Assignee as creditor—Disclosure of status.*—Under Act and an implementing regulation, petitioner company, as assignee from automobile dealers of retail installment contracts, was a creditor, and statement on contracts notifying buyer that contract was "assigned to [petitioner] in accordance with the terms of the Assignment set forth on the reverse side hereof," was a sufficient disclosure of petitioner's creditor status. Ford Motor Credit Co. v. Cenance, p. 155.

TWENTY-FIRST AMENDMENT. See **Constitutional Law**, XI.

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UNEARNED INSURANCE PREMIUMS. See **Truth in Lending Act**, 1.

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VIETNAM ERA VETERANS' READJUSTMENT ASSISTANCE ACT OF 1975.

Military reservists—Work schedules—Adjustment for military training.—Act's provision which prohibits an employer from denying an employee retention, promotion, or other incident or advantage of employment because of employee's obligations as a military reservist, does not require an employer to make work-scheduling accommodations for employee-reservists not made for other employees, and thus employer, who provided unpaid leave for employee's absences from regularly scheduled weekend workdays resulting from attendance at military training, was not liable for lost wages because of employer's failure to reschedule reservist's work shifts on such occasions. Monroe v. Standard Oil Co., p. 549.

VIRGINIA. See **Constitutional Law**, I, 1; III, 3; X, 2; **Justiciability.**

VOTING RIGHTS ACT OF 1965.

Reapportionment of county precincts—Applicability of federal preclearance requirements.—Federal preclearance requirements of § 5 of Act apply to reapportionment plan for county commissioner precincts for Kleberg County, Tex., even though plan had been submitted by county officials pursuant to order of District Court that found earlier apportionment plan

VOTING RIGHTS ACT OF 1965—Continued.

to be unconstitutional, and even though District Court approved plan. McDaniel v. Sanchez, p. 130.

WAGE GUARANTEES. See **Occupational Safety and Health Act of 1970.**

WAGES. See **Civil Rights Act of 1964; Occupational Safety and Health Act of 1970; Treasury Regulations.**

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WORDS AND PHRASES.

1. *"Consumer credit."* § 161 (a), Truth in Lending Act, 15 U. S. C. § 1666 (a). American Express Co. v. Koerner, p. 233.

2. *"Contracts . . . between . . . labor organizations."* § 301 (a), Labor Management Relations Act, 29 U. S. C. § 185 (a). Plumbers & Pipefitters v. Plumbers & Pipefitters, p. 615.

3. *"Enterprise."* 18 U. S. C. § 1961 (4). United States v. Turkette, p. 576.

4. *"Incident or advantage of employment."* Vietnam Era Veterans' Readjustment Assistance Act of 1975, 38 U. S. C. § 2021 (b)(3). Monroe v. Standard Oil Co., p. 549.

5. *"Security interest."* § 128 (a)(10), Truth in Lending Act, 15 U. S. C. § 1638 (a)(10). Anderson Bros. Ford v. Valencia, p. 205.

6. *"To the extent feasible."* § 6 (b)(5), Occupational Safety and Health Act of 1970, 29 U. S. C. § 655 (b)(5). American Textile Manufacturers Institute v. Donovan, p. 490.

7. *"Wages."* §§ 3121 (a), 3306 (b), 3401 (a), Internal Revenue Code of 1954, 26 U. S. C. §§ 3121 (a), 3306 (b), 3401 (a). Rowan Cos. v. United States, p. 247.

WORK SCHEDULING FOR MILITARY RESERVISTS. See **Vietnam Era Veterans' Readjustment Assistance Act of 1975.**

ZONING. See **Constitutional Law**, VI, 2.

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